# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1932

## No. 147

SAM HAWKS, J. F. McKEEL, AND LEW WENTZ, CONSTITUTING THE STATE HIGHWAY COMMISSION OF OKLAHOMA, ET AL., PETITIONERS,

*vs.*

CHARLES H. HAMILL AND WILLOUGHBY G. WALLING

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 10, 1932

CERTIORARI GRANTED OCTOBER 10, 1932

**(36,844)**

# (36,844)

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# TRANSCRIPT OF RECORD.

## United States Circuit Court of Appeals
TENTH CIRCUIT.

No. 511

CHARLES H. HAMILL AND WILLOUGHBY G. WALLING, APPELLANTS,

vs.

SAM HAWKS, J. F. McKEAL and LEW WENTZ, CONSTITUTING THE STATE HIGHWAY COMMISSION OF OKLAHOMA; AND J. BERRY KING, ATTORNEY GENERAL OF OKLAHOMA; PURMAN WILSON, COUNTY ATTORNEY OF McCLAIN COUNTY, OKLAHOMA; PERSON WOODALL, COUNTY ATTORNEY OF CLEVELAND COUNTY, OKLAHOMA; AND J. R. EVATT, A. O. MADDOX, J. E. COLBERT, J. C. TODD, GEORGE CARPENTER AND GEORGE N. CHURCH, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

FILED JUNE 29, 1931.

In the District Court of the United States for the Western District of Oklahoma.

Charles H. Hamill, et al., Complainants, vs. Sam Hawks, et al., Defendants. In Equity No. 1224.

Citation on Appeal.

United States of America, ss.

To Sam Hawks, J. F. McKeal and Lew Wentz, Constituting the State Highway Commission of Oklahoma, and J. Berry King, Attorney General of Oklahoma; Purman Wilson,

County Attorney of McClain County, Oklahoma; Person Woodall, County Attorney of Cleveland County, Oklahoma, and J. R. Evatt, A. O. Maddox, J. E. Colbert, J. C. Todd, George Carpenter and George N. Church, Appellees, Greetings:

You are hereby cited and admonished to be and appear in the Circuit Court of Appeals of the United States for the Tenth Circuit, in the City of Denver, State of Colorado, within forty (40) days from the date hereof, pursuant to an order allowing appeal from the District Court of the United States for the Western District of Oklahoma, in a suit wherein Charles H. Hamill and Willoughby G. Walling are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said Charles H. Hamill and Willoughby G. Walling should not be corrected, and why speedy justice should not be done to the parties in their behalf.

Given under my hand this 4 day of June, 1931.

F. E. Kennamer,
Judge of the District Court of the United States
for the Western District of Oklahoma.

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Service of a copy of the foregoing citation is acknowledged this 16th day of June, 1931.

W. C. Lewis,

Attorney for Sam Hawks, J. F. McKeal and Lew Wentz, constituting the State Highway Commission of Oklahoma, and J. Berry King, Attorney General of Oklahoma.

---

Service of a copy of the foregoing citation is acknowledged this 6th day of June, 1931.

Purman Wilson,

Attorney for Purman Wilson, County Attorney of McClain County, Oklahoma, J. R. Evatt, A. O. Maddox and J. E. Colbert.

Service of a copy of the foregoing citation is acknowledged this 5th day of June, 1931.

Person E. Woodall,

Attorney for defendants Person Woodall, County Attorney of Cleveland County, Oklahoma, J. C. Todd, George Carpenter and George N. Church.

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Filed June 18, 1931. Theodore M. Filson, Clerk. By Grace G. Butler, Deputy.

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In the District Court of the United States for the Western District of Oklahoma.

Charles H. Hamill and Willoughby G. Walling, Complainants, vs. Sam Hawks, J. F. McKeal and Lew Wentz, constituting the State Highway Commission of Oklahoma, and J. Berry King, Attorney General of Oklahoma; Purman Wilson, County Attorney of McClain County, Oklahoma; Person Woodall, County Attorney of Cleveland County, Oklahoma, and J. R. Evatt, A. O. Maddox, J. E. Colbert, J. C. Todd, George Carpenter and George N. Church, Defendants. Equity No. 1224.

Bill of Complaint.

The complainants, Charles H. Hamill and Willoughby G. Walling, complain of the defendants, Sam Hawks, J. F. McKeal and Lew Wentz, constituting the State Highway Commission of Oklahoma; J. Berry King, Attorney General of Oklahoma: Purman Wilson, County Attorney of McClain County, Oklahoma; Person Woodall, County Attorney of Cleveland County, Oklahoma, and J. R. Evatt, A. O. Maddox, J. E. Colbert, J. C. Todd, George Carpenter and George N. Church, and for cause thereof complainants allege:

Complainants are residents and inhabitants of the City of Chicago, in the State of Illinois.

The defendants, Sam Hawks, J. F. McKeal and Lew Wentz

are residents and inhabitants of the Western District of Oklahoma, and they are the duly appointed, qualified and acting members of the State Highway Commission of the State of Oklahoma, and as such they have control and supervision of the State highway system of the State of Oklahoma. The defendant, J. Berry King, is a resident and inhabitant of the Western District of Oklahoma, and is the duly elected, qualified and acting Attorney General of the State of Oklahoma, and as such is the chief law officer of said State, and is authorized by law to institute and carry on proceedings for and in behalf of the State Highway Commission and the State of Oklahoma.

The defendant, Purman Wilson, is a resident and inhabitant of the Eastern District of Oklahoma, and is the duly elected, qualified and acting County Attorney of McClain County, State of Oklahoma, and is the chief law officer of said county.

The defendant, Person Woodall, is a resident and inhabitant of the Western District of Oklahoma, and is the duly elected, qualified and acting County Attorney of Cleveland County, State of Oklahoma, and is the chief law officer of said county.

That the defendants, J. R. Evatt, A. O. Maddox and J. E. Colbert, are residents and inhabitants of the Eastern District of Oklahoma, and the defendants, J. C. Todd, George Carpenter and George N. Church, are residents and inhabitants of the Western District of Oklahoma.

This action is one between citizens and residents of the State of Illinois, as plaintiffs, and citizens and residents of the State of Oklahoma, as defendants, and the amount in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00

That heretofore, on the 22nd day of April, 1911, the County Commissioners of McClain County, State of Oklahoma, granted to Dorset Carter and Tom Halsell, and their assigns, a franchise to construct, erect and maintain a toll bridge across the South Canadian River at or near Purcell, Oklahoma; that the franchise so granted was perpetual, subject

only to such limitations as by law provided. A copy of said franchise is attached hereto, marked Exhibit A, and made a part hereof.

On the 16th day of May, 1911, the Board of County Commissioners of Cleveland County, Oklahoma, granted to Dorset Carter and Tom Halsell, and their assigns, a franchise to construct, maintain and operate a toll bridge, and to collect tolls thereon across the South Canadian River, which franchise was perpetual, subject only to such limitations as provided by law. A copy of said franchise is attached hereto, marked Exhibit B, and made a part hereof.

That on the 20th day of June, 1911, Dorset Carter acquired title by warranty deed executed by H. W. Archer and J. G. Archer to the following described property in the City of Purcell, McClain County, Oklahoma, to wit:

> The tract of land situated in the City of Purcell, McClain County, State of Oklahoma, described as follows: Beginning at the Northwest corner of block ninety-two (92); thence South along the West boundary line of said block a distance of twenty five (25) feet; thence East parallel with the North boundary line of said block a distance of three hundred (300) feet; thence North along the East boundary of said block a distance of twenty-five (25) feet to the Northeast corner of said block; thence West along the North boundary of said block a distance of three hundred (300) feet to the place of beginning, according to the official map of said State.

On the 26th day of April, 1911, Dorset Carter acquired title by warranty deed from H. W. Archer and J. G. Archer to the following described property in McClain County, Oklahoma, to wit:

> A tract of land situated in the City of Purcell, McClain County, State of Oklahoma, described as follows: Beginning at the Northwest corner of block ninety-three (93); thence East forty-nine (49) feet along the North line of said block; thence South parallel with the West line of said block, one hundred and eighty-two (182) feet; thence West forty-nine (49) feet; thence North

along the West line of said block a distance of one hundred and eighty-two (182) feet.

On the 27th day of May, 1911, Dorset Carter acquired by deed from Henry Braum, Trustee, an easement for the purpose of erecting a bridge thereon, and the right to do any and all other acts necessary for the construction and maintenance of such bridge, to continue so long as such bridge shall be maintained, a strip of land situated on the North side of Block 93 in the City of Purcell, McClain County, Oklahoma, described as follows:

> Beginning at the Northeast corner of Block ninety-three (93); thence West along the North line of said block a distance of one hundred and seventy (170) feet; thence South parallel with the West line of said block a distance of twenty (20) feet; thence East and parallel with the North line of said block a distance of one hundred and seventy (170) feet; thence North along the East line of said block a distance of twenty (20) feet to the place of beginning.

That pursuant to the authority granted by the aforesaid franchises, the said Dorset Carter and Tom Halsell commenced the construction of a toll bridge across the South Canadian River extending from a point on the West Side of said river at or near the City of Purcell in the County of McClain, to a point on the East side of said river at or near the City of Lexington in the County of Cleveland, in the State of Oklahoma.

On the 18th day of May, 1911, Willoughby G. Walling, Charles H. Hamill and Dorset Carter caused to be incorporated under the laws of the State of Oklahoma a corporation under the name of Purcell-Lexington Toll Bridge Company, and articles of incorporation were duly filed with the Secretary of State of the State of Oklahoma on said date, incorporating Purcell-Lexington Toll Bridge Company for the purpose of erecting, constructing, building and maintaining, or to lease or purchase and operate the toll bridge and the approaches thereto, over and across the South Canadian River at or near the City of Purcell, McClain County, Okla-

homa, to the East bank of said river into Cleveland County, State of Oklahoma, for the passage of footmen, passengers, cattle, and vehicles of all kinds, and all wires for the transmission of electric currents for speech, light or power, and for pipes and mains for water and gas, and to collect and receive tolls for such service, and to lease or sell such rights over said bridge and the approaches thereto; that said articles of incorporation provide:

> "That the term for which the corporation is to exist is twenty years."

That thereafter, on the 6th day of December, 1911, Dorset Carter, Tom Halsell, Willoughby G. Walling and Charles H. Hamill executed a certain conveyance to Purcell-Lexington Toll Bridge Company, which transferred and conveyed to said Purcell-Lexington Toll Bridge Company that certain bridge then in process of construction across the South Canadian River in the City of Purcell in the County of McClain on the West side to the City of Lexington in the County of Cleveland on the East side, in the State of Oklahoma, with its supports, approaches, toll keeper's house, abutments, lands, franchises and property, and the right to operate and maintain the same, with the tolls to issue therefrom; the right, authority and privilege conferred upon and granted to Dorset Carter and Tom Halsell by the Board of County Commissioners of McClain County in the State of Oklahoma on the 22nd day of April, 1911, to construct, erect, maintain and operate a toll bridge, and to collect the tolls thereon, across the South Canadian River; the right, authority and privilege conferred and granted to Dorset Carter and Tom Halsell by the Board of County Commissioners of Cleveland County in the State of Oklahoma on the 16th day of May, 1911, to construct, erect, maintain and operate a toll bridge, and to collect the tolls thereon, across the South Canadian River, a copy of which conveyance is attached hereto, marked Exhibit C, and made a part hereof. That by virtue of said conveyance, Purcell-Lexington Toll Bridge Company became the owner of the property therein described and the franchise to operate the toll bridge and collect the tolls therefrom.

That on the 4th day of December, 1911, Dorset Carter and

Murphy Carter made, executed and delivered to Purcell-Lexington Toll Bridge Company a warranty deed to the real estate and easement above described. On the 23rd day of September, 1914, H. W. Archer and wife conveyed by warranty deed to Purcell-Lexington Toll Bridge Company the following described property in McClain County, Oklahoma, to wit:

> Beginning at a point 25 feet South of the Northeast corner of Lot 3 in Block 92, thence South 50 feet, thence West 50 feet, thence North 50 feet, thence East 50 feet to place of beginning, all in the town of Purcell in said McClain County, Oklahoma, according to the official map and survey of said city of Purcell.

That the said real estate was acquired by Purcell-Lexington Toll Bridge Company to be used by it as a private road in connection with the operation of the toll bridge across the South Canadian River.

That said Purcell-Lexington Toll Bridge Company completed the construction of the toll bridge across the South Canadian River, and for many years, and until recently, has owned and operated said toll bridge and the private road leading thereto, and has collected tolls from the operation of said toll bridge under the terms of the franchises granted by McClain County and Cleveland County to Dorset Carter and Tom Halsell, and assigned by them to Purcell-Lexington Toll Bridge Company.

That the corporate life of Purcell-Lexington Toll Bridge Company will expire on May 18, 1931, and said corporation will thereupon cease to exist.

That on the 2nd day of April, 1931, Purcell-Lexington Toll Bridge Company made, executed and delivered to Willoughby G. Walling, Charles H. Hamill and Dorset Carter a warranty deed conveying to the said Willoughby G Wallang, Charles H. Hamill and Dorset Carter the real estate located in the City of Purcell owned by the Purcell-Lexington Toll Bridge Company, and above described, and assigning, transferring and conveying unto them the right, authority and privilege conferred and granted to Dorset Carter and Tom

Halsell and their assigns by the Board of County Commissioners of McClain County on the 22nd day of April, 1911, to construct, erect, maintain and operate a toll bridge and to collect the tolls thereon, across the South Canadian River, which right, authority and privilege was assigned, transferred and conveyed by Dorset Carter and Tom Halsell to Purcell-Lexington Toll Bridge Company on December 6, 1911, and the right, authority and privilege conferred and granted to Dorset Carter and Tom Halsell and their assigns by the Board of County Commissioners of Cleveland County in the State of Oklahoma, on the 16th day of May, 1911, to construct, erect, maintain and operate a toll bridge and to collect tolls thereon across the South Canadian River, which said right, authority and privilege was assigned, transferred and conveyed by the said Dorset Carter and Tom Halsell to Purcell-Lexington Toll Bridge Company on December 6, 1911. A copy of said deed is attached hereto, marked Exhibit D, and made a part hereof.

On the 17th day of April, 1931, Dorset Carter made, executed and delivered to Willoughby G. Walling and Charles H. Hamill of Chicago, Illinois, a warranty deed conveying to the said Willoughby G. Walling and Charles H. Hamill all his right, title and interest in and to the property described in the last mentioned deed, and all of his right, title and interest in and to the franchises to operate a toll bridge across the South Canadian River, and to collect tolls thereon, a copy of which deed is attached hereto, marked Exhibit E, and made a part hereof.

That the said Willoughby G. Walling and Charles H. Hamill are now the owners of the private road in the City of Purcell leading to and from the abutment for the Purcell-Lexington toll bridge, and of said toll bridge with its supports, approaches, toll keeper's house, abutments, lands, franchises and property, and the right to maintain and operate the same with the tolls to issue therefrom; that they are now operating said toll bridge and collecting tolls authorized by law, and under the terms of the franchises owned by them, and under which they are operating said toll bridge and collecting tolls therefrom, they have the legal right to continue to operate

said toll bridge and collect tolls therefrom until such franchises have been revoked or repealed as provided by law; that said franchises have not been revoked or repealed and are still effective.

That the defendants, and each of them, are contending that the right to operate said toll bridge and to collect tolls from persons using the same will terminate with the corporate existence of the Purcell-Lexington Toll Bridge Company on the 18th day of May, 1931, and that the said bridge will at that time become a free bridge and a part of the State Highway System of the State of Oklahoma, with the right and privilege of the citizens of the State of Oklahoma to use the same as a public highway without the payment of tolls.

These complainants allege that the franchises to construct, operate and maintain said toll bridge and to collect tolls thereon was granted to individuals, and such franchises are neither connected with nor influenced by the corporate existence of Purcell-Lexington Toll Bridge Company, and the secondary franchise under which complainants are operating said bridge and collecting tolls does not terminate with the corporate life of Purcell-Lexington Toll Bridge Company, and such franchise continues in full force and effect in accordance with the provisions of said secondary franchise. The defendants Sam Hawks, J. F. McKeal and Lew Wentz, constituting the State Highway Commission of the State of Oklahoma, will, unless restrained and enjoined by this court, in violation of the franchise rights of these complainants, take charge of the said Purcell-Lexington toll bridge as a part of the Highway System of the State of Oklahoma, and will deprive these complainants of their private property for the use and benefit of the traveling public of the State of Oklahoma, without compensation, and will interfere with and prevent these complainants from operating said toll bridge and collecting tolls from persons using the same, and are now and will continue to encourage the citizens of the State of Oklahoma in the belief that they have a right to use said bridge without the payment of tolls after May 18, 1931, and by reason thereof it would be practically impossible for these complainants to conduct their business and to collect the tolls

which they are entitled to receive under their franchises, and the business of these complainants and their investment in said bridge will be destroyed; that the defendants, J. R. Evatt, A. O. Maddox, J. E. Colbert, J. C. Todd, George Carpenter and George N. Church, are citizens of the State of Oklahoma, residing in the vicinity of said bridge, and are representative of the citizens of the State of Oklahoma who have occasion to and will use said bridge after May 18,, 1931, and said defendants, and other citizens of the State of Oklahoma having occasion to use said bridge, will, unless restrained and enjoined by this court, use the same without payment of tolls, and complainants will either be compelled to resort to force to prevent the unlawful use of said bridge, or will be compelled to prosecute a multitude of suits for that purpose; that the citizens of the State of Oklahoma who use and will use said bridge are so numerous that it is impossible to make all of them parties, and the above named defendants are fairly representative of the entire class of citizens who travel over and across said bridge.

That the defendants contend that, if complainants shall collect tolls from persons using said bridge after May 18, 1931, they will be subject to a forfeiture of $25.00 to each person from whom toll is collected, and that they will also be guilty of obstructing the public highway and subject to a fine of not exceeding $100.00 for each offense, and will also be liable in damages to the individuals who are prevented from using said bridge.

That J. Berry King, as Attorney General of the State of Oklahoma, has threatened to and will institute injunction proceedings or other legal proceedings against complainants for the purpose of preventing the complainants from operating said bridge and collecting tolls therefrom unless enjoined by this court.

That the defendant, Purman Wilson, County Attorney of McClain County, Oklahoma, and Person Woodall, County Attorney of Cleveland County, Oklahoma, will, unless enjoined by this court, institute proceedings to prevent complainants from operating said bridge and collecting tolls therefrom, and will institute other proceedings to punish the

complainants for the alleged unlawful obstruction of the public highway.

The complainants will be subject to wrongful and unlawful interference with their business in operating said toll bridge by the defendants, and each of them, and subjected to a multiplicity of suits and legal proceedings, and the complainants will be unable to operate their business without serious and imminent danger to persons and property, and without subjecting themselves to a multiplicity of suits and legal proceedings on the part of the defendants and other citizens of the State of Oklahoma desiring to use said toll bridge.

Complainants have no adequate remedy at law, and unless this court will grant an injunction herein these complainants will suffer irreparable injury and damage, and these complainants will be deprived of their property for public use without compensation.

That immediate and irreparable loss or damage will result to the complainants before this matter can be heard on notice, unless a temporary restraining order shall be granted by this court. Complainants offer to submit to such conditions as may be equitable and just upon the granting of said temporary injunction.

Wherefore, premises considered, complainants pray as follows:

That this court will issue a temporary injunction enjoining the defendants, and each of them, and all other persons acting by, through or under them, and all citizens of the State of Oklahoma using the Purcell-Lexington toll bridge, from interfering with the complainants in the operation of said toll bridge, and in the collection of tolls from persons using said toll bridge, and from using said bridge without payment of tolls; enjoining the defendants, and each of them, from taking any proceedings before any tribunal of the State of Oklahoma seeking in any wise to prevent the complainants from operating said toll bridge or collecting tolls from persons using the same, or seeking to punish complainants or collect penalties and forfeitures from complainants

because of the operation of said toll bridge and the collection of tolls from persons using the same; that upon final hearing said temporary injunction so issued be made permanent and perpetual; that a temporary restraining order be issued against the defendants, and each of them, pending the hearing on the application for temporary injunction, and that the complainants have all such other and further relief to which they may be entitled in equity.

C. B. Cochran,
Attorney for Complainant.

Ames, Cochran, Ames & Monnet,
Of Counsel.

State of Illinois, County of Cook, ss.

Charles H. Hamill, being first duly sworn, on oath states: I am one of the complainants in the above entitled action. I have read the above and foregoing bill of complaint and am familiar with the averments therein contained, and the facts stated in said bill are true.

Charles H. Hamill.

Subscribed and sworn to before me this 6th day of May, 1931. Thomas G. Lawrence, Notary Public. My commission expires May 4, 1932. (Seal.)

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Exhibit A.

State of Oklahoma, County of McClain, ss.

The Board of County Commissioners of McClain County, State of Oklahoma, met in special session on the 22nd day of April, 1911, pursuant to the call of the County Clerk as follows:

I. C. W. Hoggard, County Clerk of McClain County, Oklahoma, hereby call a meeting of the County Commissioners of McClain County. To meet at the County Seat, Saturday, April 22nd, 1911, at one o'clock P. M. for the purpose of acting upon an application of Dorset Carter and Tom Hal-

sell, for authority and permission to construct, erect and maintain a toll Bridge across the South Canadian River at or near Purcell, Oklahoma.

Dated this 17th day of April, 1911.

C. W. Hoggard,
County Clerk of McClain County.

At which time there were present, L. L. Hawk, Chairman, G. Watt Morris, member, and C. W. Hoggard, County Clerk, and the following business transacted, to wit:

The matter of acting upon the application of Dorset Carter and Tom Halsell, for authority and permission to construct, erect and maintain a Toll Bridge across the South Canadian River at or near Purcell, Oklahoma, coming on for consideration, the following resolution is by the Board adopted:

Be it resolved by the Board of County Commissioners of McClain County, Oklahoma, that, the right, authority and privilege to construct, erect, maintain and operate a toll Bridge and collect tolls thereon across the South Canadian River, be and the same is hereby granted unto Dorset Carter and Tom Halsell, or their assigns, of Purcell, Oklahoma. Said bridge to be erected within the time, as provided by law, or else this authority be null and void.

Section 2. Said bridge shall be constructed across the South Canadian River, beginning at or near a point in the City of Purcell where the East end of Jefferson Street intersects with the South Canadian River, not exceeding 1000 feet North or South thereof, and said bridge to extend across the said river in a general easterdly direction.

Section 3. That the tolls to be collected by the said grantees or assigns, shall be as follows: Private conveyance,

Each vehicle, not exceeding two occupants____25c each way
Each additional passenger _____ 5c each way
Horse and rider _____10c each way
Footman . _____ 5c each way

Public Conveyance.

| | |
|---|---|
| Passenger vehicle and driver | $50.00 per annum |
| Each additional passenger | 5c each way |
| Freight vehicle and driver | $25.00 per annum |

The tolls above enumerated shall not be increased by the Bridge Co. except as is now and may be hereafter legally provided; but may be reduced by said Bridge Co. upon the posting by them of proper notices as is provided by law.

Section 4. That the grants herein made shall be perpetual, subject only to such limitations as is by law now or may be hereinafter provided.

Section 5. Nothing herein contained shall be construed as giving to the said grantee, or their assigns, the exclusive right to construct and operate a toll bridge over and across said stream, but the power is expressly herein reserved by the said Board of County Commissioners to make other and similar grants to other parties, firms or corporations, as in its judgment, as it may deem expedient.

Section 6. That the grantees may transfer all its rights and privileges herein granted unto any individual or corporation organized under the laws of the State of Oklahoma and the said conveyance by the said grantees vest unto such individuals or corporations all the rights and privileges and concessions herein made and granted, as though such rights, privileges and grants had been made direct to such corporations, provided, however, when the said grantees herein do convey or assign their rights and privileges as herein granted, that the instrument conveying the same to be filed or recorded in the office of the Register of Deeds of McClain County.

Ordered that the Board be and is adjourned.

Approved:

L. L. Hawk, Chairman.

Attest:

C. W. Hoggard, County Clerk.

Exhibit B.

In the Matter of Toll Bridge, ss.

Be it resolved by the Board of County Commissioners of Cleveland County, that the right, authority and the privilege to construct, erect, maintain and operate a toll bridge and to collect tolls thereon, across the South Canadian river be, and the same is hereby granted unto Dorsett Carter and Tom Halsell, or their assigns, of Purcell, Oklahoma. Said bridge to be erected within the time as provided by law, otherwise this authority will be null and void.

Sec. 2. Said bridge shall be erected across said South Canadian River beginning at or near a point where the public highway, located on the section line between Section Six (6) and Seven (7), Township Six (6) North, Range One (1) West, intersects the East bank of the South Canadian River, in Cleveland County and State of Oklahoma, and on the north part of said public highway, and said bridge shall extend in a general westerly direction across the South Canadian River to a point at or near the intersection of Jefferson Street in the City of Purcell, State of Oklahoma. And so much of said public highway, situated on the section line between sections Six (6) and Seven (7), Township Six (6) North, Range One (1) West, not exceeding twenty feet in width and one thousand feet in length, is hereby granted to the said Dorset Carter and Tom Halsell for the purpose of the construction and erection and operation of said bridge and approaches thereto.

Sec. 3. That the tolls to be collected by said grantees, or assigns, shall be as follows:

Private Conveyances.

| | |
|---|---|
| Each vehicle, not exceeding two occupants | 25c each way |
| Each additional passenger | 5c each way |
| Horse and rider | 10c each way |
| Footmen | 5c each way |

Public Conveyances.

| | |
|---|---|
| Passenger vehicle and driver | $50.00 per annum |
| Freight vehicle and driver | 25.00 per annum |
| Each passenger | 5c each way |

The tolls above enumerated shall not be increased by the Bridge Company except as is now, or may hereafter be legally provided, but may be reduced by said Bridge Company upon the posting by them of proper notices as is provided by law.

Sec. 4. That the grants herein made shall be perpetual, subject only to such limitations as is by law now or may hereafter be provided.

Sec. 5. Nothing herein contained shall be construed as giving to the said grantees, or their assigns, the exclusive right to construct and operate a toll bridge over, and across said stream, but the power is expressly herein reserved by the Board of County Commissioners to make other and similar grants to other parties, firms or corporations, as in its judgment it may deem expedient.

Sec. 6. That the grantees may transfer all the rights and privileges herein granted unto any individual or corporation, organized under the laws of the State of Oklahoma, and the said conveyance by said grantees shall vest unto such individual or corporation all the rights and privileges and concessions herein made and granted, as though such rights, privileges and grants had been made direct to such corporation, provided, however, when the said grantees herein do convey or assign their rights and privileges as herein granted, that the instrument conveying the same be filed in the office of the Register of Deeds of Cleveland County.

Attest:
(Seal) J. A. Fox, Chm. Board of Co. Comm.

State of Oklahoma, Cleveland County, ss.

I. E. B. Helms, County Clerk of the aforesaid County and State, do hereby certify that the above and foregoing is a true and correct copy of part of the Commissioners' Proceedings of May 16th, 1911.

In testimony whereof I set my hand and official seal this 27th day of June, 1928.

(Seal) E. B. Helms,
County Clerk.

Exhibit C.

This indenture, made this 6th day of December, A. D. 1911, by and between Dorset Carter and Tom Halsell, both of the City of Purcell, State of Oklahoma, and Willoughby G. Walling and Charles H. Hamill, both of the City of Chicago, State of Illinois, parties of the first part, and Purcell-Lexington Toll Bridge Company, a corporation, organized and existing under and by virtue of the laws of the State of Oklahoma, party of the second part, witnesseth: That

For and in consideration of the sum of One Hundred ($100.00) Dollars, by the party of the second part, unto the parties of the first part paid, and other good and valuable considerations, the receipt whereof is hereby acknowledged, the parties of the first part have granted, bargained, sold, remised—aliened, conveyed, assigned, and transferred and by these presents do grant, bargain, sell, remise, alien, convey, assign and transfer, unto said party of the second part;

(a) That certain bridge now in process of construction across the South Canadian River from the City of Purcell in the County of McClain, on the West side, to the City of Lexington in the County of Cleveland on the East side, in the State of Oklahoma, with its supports, approaches, toll-keeper's house, abutments, lands, franchises and property, and the right to operate and maintain the same with the tolls to issue therefrom.

(b) The right, authority and privilege conferred upon and granted to Dorset Carter and Tom Halsell, by the Board of County Commissioners of McClain County, in the State of Oklahoma, on the 22nd day of April, 1911, to construct, erect, maintain and operate a toll bridge, and to collect the tolls thereon, across the South Canadian River.

(c) The right, authority and privilege conferred and granted to Dorset Carter and Tom Halsell, by the Board of County Commissioners of Cleveland County in the State of Oklahoma, on the 16th day of May, 1911, to construct, erect, maintain and operate a toll bridge and to collect the tolls thereon, across the South Canadian River.

Together with all the estate, right, title and interest of the said parties of the first part or any one or more of them in and to the above described bridge and premises, and all the rights, privileges and appurtenances, now or hereafter appertaining thereto.

To have and to hold the same, together with the tolls, rents, issues and profits arising and to arise therefrom, unto the said party of the second part, that at the time of the ensealing and delivering of these presents, said parties of the first part are well seized of said bridge and premises, and the property hereby conveyed or sought to be conveyed, in fee simple, and that they have full right and power to grant, bargain and sell the same in manner and form as aforesaid, that the same are free and clear of all liens and encumbrances whatever, and the said parties of the first part will warrant and forever defend the same to the said Purcell-Lexington Toll Bridge Company, its successors, or successors and assigns, against all claims whatsoever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

(Seal) Dorset Carter.
(Seal) Tom Halsell.
(Seal) Willoughby G. Walling.
(Seal) Charles H. Hamill.

State of Oklahoma, County of McClaim, ss.

Before me, a Notary Public in and for said county and State, on this 11 day of December, 1911, personally appeared Dorset Carter and Tom Halsell, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

(Seal) M. L. Barnett, Notary Public.

State of Illinois, County of Cook, ss.

I, William J. Mack, a Notary Public, do hereby certify that Willoughby G. Walling and Charles H. Hamill, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 7th day of December, A. D. 1911.

(Seal) William J. Mack, Notary Public.

State of Oklahoma, McClain County, ss.

This instrument was filed for record on the 11 day of Dec., 1911, at 11:45 A. M. and duly recorded. C. M. McClain, Register of Deeds.

State of Oklahoma, County of McClain, ss.

I, Pearl Daugherty, County Clerk in and for said County and State, do hereby certify that the above and foregoing is a true and correct copy of deed as the same appears of record in my office in the City of Purcell, in book 28 at page 152.

Witness my hand and official seal this the 3rd day of July, 1928.

Pearl Daugherty, County Clerk,
By Mabele Cox, Deputy.

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Exhibit D.

Deed.

This indenture, made this 2nd day of April, A. D. 1931, by and between Purcell-Lexington Toll Bridge Company, a corporation, organized and existing under and by virtue of the laws of the State of Oklahoma, party of the first part, and Willoughby G. Walling, Charles H. Hamill and Dorset Carter, parties of the second part, witnesseth as follows, to wit:

That for and in consideration of the sum of Ten Dollars ($10.00) paid by parties of the second part unto party of the first part, and other good and valuable considerations, the receipt of which is hereby acknowledged, the party of the first part has granted, bargained, sold, remised, aliened, conveyed, assigned and transferred, and by these presents does grant, bargain, sell, remise, alien, convey, assign and transfer unto said parties of the second part:

(a) That certain bridge across the South Canadian River extending from a point on the West side of said river at or near the City of Purcell in the County of McClain, to a point on the East side of said river at or near the City of Lexington in the County of Cleveland, in the State of Oklahoma, said bridge being known as the Purcell-Lexington Toll Bridge; together with its supports, approaches, toll keeper's house; abutments, lands, franchises and property, and the right to operate and maintain the same, with the tolls to issue therefrom.

(b) The tract of land situated in the City of Purcell, McClain County, State of Oklahoma, described as follows: Beginning at the Northwest corner of block ninety-two (92); thence South along the West boundary line of said block a distance of twenty-five (25) feet; thence East parallel with the North boundary line of said block a distance of three hundred (300) feet; thence North along the East boundary of said block a distance of twenty-five (25) feet to the Northeast corner of said block; thence West along the North boundary of said block a distance of three hundred (300) feet to the place of beginning, according to the official map of said City.

(c) A tract of land situated in the City of Purcell, McClain County, State of Oklahoma, described as follows: Beginning at the Northwest corner of block ninety-three (93); thence East forty-nine (49) feet along the North line of said block; thence South parallel with the West line of said block, one hundred and eighty-two (182) feet; thence West forty-nine (49) feet; thence North along the West line of said block a distance of one hundred and eighty-two (182) feet.

(d) An easement to enter upon and make use of the following strip of ground for the purpose of erecting a bridge thereon, with the right to rest the supports for said bridge, and to do any and all other acts necessary for the contruction and maintenance of such bridge, to continue so long as said bridge shall be maintained, to-wit, a strip of land situated on the North side of block ninety-three (93) in the City of Purcell, County of McClain and State of Oklahoma, beginning at the Northeast corner of block ninety-three (93), thence West along the North line of said block a distance of one hundred and seventy (170) feet; thence South parallel with the West line of said block a distance of twenty (20) feet; thence East and parallel with the North line of said block a distance of one hundred and seventy (170) feet; thence North along the East line of said block a distance of twenty (20) feet to the place of beginning.

(e) A tract of land situated in the City of Purcell, McClain County, State of Oklahoma, described as follows: Beginning at a point twenty-five (25) feet South of the Northeast corner of Lot Three (3) in Block Ninety-two (92); thence South fifty (50) feet; thence West fifty (50) feet; thence North fifty (50) feet; thence East fifty (50) feet to the place of beginning.

(f) The right, authority and privilege conferred upon and granted to Dorset Carter and Tom Halsell, and their assigns, by the Board of County Commissioners of McClain County in the State of Oklahoma, on the 22nd day of April, 1911, to construct, erect, maintain and operate a toll bridge, and to collect the tolls thereon across the South Canadian River, which right, authority and privilege was assigned, transferred and conveyed by the said Dorset Carter and Tom Halsell to Purcell-Lexington Toll Bridge Company on December 6, 1911.

(g) The right, authority and privilege conferred upon and granted to Dorset Carter and Tom Halsell and their assigns, by the Board of County Commissioners of Cleveland County in the State of Oklahoma, on the 16th day of May, 1911, to construct, erect, maintain and operate

a toll bridge, and to collect the tolls thereon across the South Canadian River, which said right, authority and privilege was assigned, transferred and conveyed by the said Dorset Carter and Tom Halsell to Purcell-Lexington Toll Bridge Company on December 6, 1911;

together with all the estate, right, title and interest of the said party of the first part in and to the above described bridge and premises, and all the rights, privileges and appurtenances now or hereafter appurtaining thereto, and warrant the title to the same.

To have and to hold the same, together with the tolls, rents, issues and profits arising and to arise therefrom, unto the said parties of the second part, their successors and assigns forever.

Signed and delivered this second day of April, 1931.

Purcell-Lexington Toll Bridge Company,

By (Signed) Willoughby G. Walling,
President.

(Seal)

Attest:

(Signed) Charles H. Hamill,
Secretary.

State of Illinois, County of Cook, ss.

Before me, a Notary Public in and for said County and State, on this 7th day of April, 1931, personally appeared Willoughby G. Walling, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its President, and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

Given under my hand and seal the day and year last above written. (Signed) George R. Honsinger, Notary Public. (Seal.). My commission expires August 27th, 1931.

State of Illinois, County of Cook, ss.

Before me, a Notary Public in and for said county and

State, on this ninth day of April, 1931, personally appeared Charles H. Hamill, Secretary of the Purcell-Lexington Toll Bridge Company (a corporation), and to me known to be the identical person who subscribed the foregoing instrument as the secretary of said corporation, and acknowledged to me that he executed the said instrument and caused the corporate seal of the said corporation to be affixed thereto as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

Given under my hand and seal the day and year last above written. (Signed) Florence E. Lund, Notary Public (Seal). My commission expires December 13, 1934.

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Exhibit E.

Deed.

This indenture, made this 17th day of April, A. D. 1931, by and between Dorset Carter of Oklahoma County, Oklahoma, party of the first part, and Willoughby G. Walling and Charles H. Hamill of Chicago, Illinois, parties of the second part, witnesseth as follows, to wit:

That for and in consideration of the sum of Ten Dollars ($10.00) paid by parties of the second part unto party of the first part, and other good and valuable considerations, the receipt of which is hereby acknowledged, the party of the first part has granted, bargained, sold, remised, aliened, conveyed, assigned and transferred, and by these presents does grant, bargain, sell, remise, alien, convey, assign and transfer unto said parties of the second part, all of his right, title, interest and estate in and to the following described property, to wit:

(a) That certain bridge across the South Canadian River extending from a point on the West side of said river at or near the City of Purcell in the County of McClain, to a point on the East side of said river at or near the City of Lexington in the County of Cleveland, in the State of Oklahoma, said bridge being known as

the Purcell-Lexington Toll Bridge; together with its supports, approaches, toll keeper's house; abutments, lands, franchises and property, and the right to operate and maintain the same, with the tolls to issue therefrom.

(b) The tract of land situated in the City of Purcell, McClain County, State of Oklahoma, described as follows: Beginning at the Northwest corner of block ninety-two (92); thence South along the West boundary line of said block a distance of twenty-five (25) feet; thence East parallel with the North boundary line of said block a distance of three hundred (300) feet; thence North along the East boundary of said block a distance of twenty-five (25) feet to the Northeast corner of said block; thence West along the North boundary of said block a distance of three hundred (300) feet to the place of beginning, according to the official map of said City.

(c) A tract of land situated in the City of Purcell, McClain County, State of Oklahoma, described as follows: Beginning at the Northwest corner of block ninety-three (93); thence East forty-nine (49) feet along the North line of said block; thence South parallel with the West line of said block, one hundred and eighty-two (182) feet; thence West forty-nine (49) feet; thence North along the West line of said block a distance of one hundred and eighty-two (182) feet.

(d) The easement to enter upon and make use of the following strip of ground for the purpose of erecting a bridge thereon, with the right to rest the supports for said bridge, and to do any and all other acts necessary for the construction and maintenance of such bridge, to continue so long as said bridge shall be maintained, to-wit, a strip of land situated on the North side of block ninety-three (93) in the City of Purcell, County of McClain and State of Oklahoma, beginning at the Northeast corner of block ninety-three (93); thence West along the North line of said block a distance of one hundred and seventy (170) feet; thence South parallel with the West line of said block a distance of twenty (20) feet;

thence East and parallel with the North line of said block a distance of one hundred and seventy (170) feet; thence North along the East line of said block a distance of twenty (20) feet to the place of beginning.

(e) A tract of land situated in the City of Purcell, McClain County, State of Oklahoma, described as follows: Beginning at a point twenty-five (25) feet South of the Northeast corner of Lot Three (3) in Block Ninety-two (92); thence South fifty (50) feet; thence West fifty (50) feet; thence North fifty (50) feet; thence East fifty (50) feet to the place of beginning.

(f) The right, authority and privilege conferred upon and granted to Dorset Carter and Tom Halsell, and their assigns, by the Board of County Commissioners of McClain County in the State of Oklahoma, on the 22nd day of April, 1911, to construct, erect, maintain and operate a toll bridge, and to collect the tolls thereon across the South Canadian River, which right, authority and privilege was assigned, transferred and conveyed by the said Dorset Carter and Tom Halsell to Purcell-Lexington Toll Bridge Company on December 6, 1911.

(g) The right, authority and privilege conferred upon and granted to Dorset Carter and Tom Halsell, and their assigns, by the Board of County Commissioners of Cleveland County in the State of Oklahoma, on the 16th day of May, 1911, to construct, erect, maintain and operate a toll bridge, and to collect the tolls thereon across the South Canadian River, which said right, authority and privilege was assigned, transferred and conveyed by the said Dorset Carter and Tom Halsell to Purcell-Lexington Toll Bridge Company on December 6, 1911;

together with all the estate, right, title and interest of the said party of the first part in and to the above described bridge and premises, and all the rights, privileges and appurtenances now or hereafter appurtaining thereto, and warrant the title to the same.

To have and to hold the same, together with the tolls, rents, issues and profits arising and to arise therefrom, unto

the said parties of the second part, their successors and assigns forever.

Signed and delivered this 17th day of April, 1931.

(Signed) Dorset Carter.

State of Oklahoma, County of Oklahoma, ss.

Before me, a Notary Public in and for said county and State, on this 17th day of April, 1931, personally appeared Dorset Carter, to me known to be the identical person who executed the foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

Given under my hand and seal the day and year last above written. (Signed) Emma Seberger, Notary Public (Seal). My commission expires Jan. 12, 1933.

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Endorsed: Filed in District Court on May 15, 1931.

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Temporary Restraining Order.

On this 15th day of May, 1931, the application of complainants for a temporary restraining order comes on for hearing, the complainants appearing by their counsel, C. B. Cochran.

Thereupon the complainants introduced their verified bill, and upon consideration thereof the court finds that a temporary restraining order should be, and hereby is, granted in this case to this effect:

That the defendants, and each of them, and all persons acting by, through, or under them, and all citizens of the State of Oklahoma using the Purcell-Lexington Toll Bridge, be, and they are, hereby restrained from interfering with the complainants in the operation of the Purcell-Lexington toll bridge, and in the collection of tolls from persons using said toll bridge, and from using said bridge without payment of

tolls, and said defendants, and each of them, are further restrained from taking any proceeding before any tribunal of the State of Oklahoma seeking in any wise to prevent the complainants from operating said toll bridge, or collecting tolls from persons using the same, or seeking to punish complainants or collect penalties or forfeitures from complainants because of the operation of said toll bridge and the collection of tolls from persons using the same.

It is further ordered that this restraining order shall be in force and effect for ten (10) days only, unless otherwise ordered, and in no event to be in force and effect, unless reordered, beyond the time of the decision herein upon complainants' application for a temporary injunction.

It is further ordered that the hearing on complainants' application for a temporary injunction is hereby set for the 23rd day of May, 1931, at 10 o'clock A. M. in the United States Court Room at Oklahoma City, Oklahoma.

It is further ordered that complainant shall execute a bond to the defendants in the sum of Five Thousand ($5,000.00) to be approved by this court, conditioned that complainants will deliver to each person paying toll during the pendency of this restraining order a receipt for the toll so paid, and further conditioned that the complainants will return the toll collected during the pendency of this restraining order to the holder or holders of said receipts in the event such return shall be ordered by this court.
May 15th, 1931.

Edgar S. Vaught,
District Judge.

Endorsed: Filed in District Court on May 15, 1931.

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**Bond.**

Know all men by these presents:—

That Charles H. Hamill and Willoughby G. Walling, as principals, and The Aetna Casualty and Surety Company of Hartford, Connecticut, as surety, acknowledge ourselves

bound unto Sam Hawks, J. F. McKeal, and Lew Wentz, constituting the State Highway Commission of Oklahoma, and J. Berry King, Attorney General of Oklahoma; Purman Wilson, County Attorney of McClain County, Oklahoma; Person Woodall, County Attorney of Cleveland County, Oklahoma, and J. R. Evatt, A. O. Maddox, J. E. Colbert, J. C. Todd, George Carpenter and George N. Church, in the sum of Five Thousand Dollars ($5,000.00) for the payment of which well and truly to be made according to the terms and conditions of this bond, we bind ourselves, our heirs, successors and assigns.

This bond is conditioned that if Charles H. Hamill and Willoughby G. Walling shall cause to be delivered to each person paying toll for the use of Purcell-Lexington toll bridge beginning May 18, 1931, and during the pendency of the restraining order issued herein on May 15, 1931, a receipt for the toll so paid, and that they will return the toll collected during said period to the holder or holders of said receipts in the event such return shall be ordered by this court, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

Dated this 16th day of May, 1931.

Willoughby G. Walling,
Charles H. Hamill,

By C. B. Cochran,
Their Attorney,

Principals.

The Aetna Casualty and Surety Company of Hartford, Connecticut,

By E. R. Ledbetter,

(Seal) Attorney-in-fact,
Surety.

Approved May 19, 1931. Edgar S. Vaught, Judge.

Endorsed: Filed in District Court on May 19, 1931.

Amendment to Bill of Complaint.

Comes now the complainants, and permission of court having been first obtained for amendment to their bill of complaint, state as follows:

Complainants allege that the conveyance executed by Dorset Carter, Tom Halsell, Willoughby G. Walling and Charles H. Hamill to Purcell-Lexington Toll Bridge Company on December 6, 1911, conveying and assigning to Purcell-Lexington Toll Bridge Company the rights and privileges granted by the franchise from the County Commissioners of McClain County, Oklahoma, and the franchise from the County Commissioners of Cleveland County, Oklahoma, which said conveyance is attached to the bill of complaint and designated Exhibit C, was recorded in the office of the Register of Deeds of Cleveland County, Oklahoma, on the 12th day of December, 1911, in Book 33, at Page 626, and was recorded in the office of the Register of Deeds of McClain County, Oklahoma, on the 11th day of December, 1911, in Book 28 at Page 153; that the deed of Purcell-Lexington Toll Bridge Company to Willoughby G. Walling, Charles H. Hamill and Dorset Carter, dated April 2, 1931, and assigning and conveying to the said Willoughby G. Walling, Charles H. Hamill and Dorset Carter the rights and privileges to own and operate Purcell-Lexington toll bridge, and to collect tolls therefrom in accordance with the franchises granted by the County Commissioners of McClain County and Cleveland County, which said conveyance is attached to the bill of complaint and designated Exhibit D, was recorded in the office of the County Clerk of Cleveland County, Oklahoma, on May 15, 1931, in Book 87 at Page 388, and was recorded in the office of the County Clerk of McClain County, Oklahoma, on the 16th day of May, 1931, in Book 97 at Page 112; that the deed from Dorset Carter to Willoughby G. Walling and Charles H. Hamill, assigning and transferring to the said Willoughby G. Walling and Charles H. Hamill the right, authority and privilege to operate Purcell-Lexington toll bridge and to collect tolls therefrom according to the franchises granted by the County Commissioners of Cleveland

County, Oklahoma, and McClain County, Oklahoma, which said deed is attached to the bill of complaint as Exhibit E, was recorded in the office of the County Clerk of Cleveland County, Oklahoma, on May 15, 1931, in Book 87 at Page 390, and recorded in the office of the County Clerk of McClain County, Oklahoma, on the 16th day of May, 1931, in Book 97 at Page 113.

C. B. Cochran,
Attorney for Complainants.

Endorsed: Filed in District Court on May 25, 1931.

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Motion of Defendants, Purman Wilson, County Attorney of McClain County, Oklahoma, and J. R. Evatt, A. O. Maddox, and J. E. Colbert, County Commissioners of McClain County, Oklahoma, to Dismiss Bill of Complaint.

Come now the defendants, Purman Wilson, County Attorney of McClain County, Oklahoma, and J. R. Evatt, A. O. Maddox, and J. E. Colbert, County Commissioners of McClain County, Oklahoma, and move the court to dismiss the above entitled cause for the reason that the bill of complaint does not state facts sufficient to entitle complainants to relief prayed for or to any relief.

Purman Wilson,

Solicitor for the Defendants, Purman Wilson, County Attorney of McClain County, Oklahoma, J. R. Evatt, A. O. Maddox and J. E. Colbert, County Commissioners of McClain County, Oklahoma.

Endorsed: Filed in District Court on May 25, 1931.

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Motion of Defendants, Person Woodall, County Attorney of Cleveland County, Oklahoma, and J. C. Todd, George Carpenter and George N. Church, County Commission-

ers of Cleveland County, Oklahoma, to Dismiss Bill of Complaint.

Come now the defendants, Person Woodall, County Attorney of Cleveland County, Oklahoma, and J. C. Todd, George Carpenter, and George N. Church, County Commissioners of Cleveland County, Oklahoma, and move the court to dismiss the above entitled cause for the reason that the bill of complaint does not state facts sufficient to entitle complainants to relief prayed for or to any relief.

Person E. Woodall,

Solicitor for the Defendants, Person Woodall, County Attorney of Cleveland County, Oklahoma, and J. C. Todd, George Carpenter, and George N. Church, County Commissioners of Cleveland County, Oklahoma.

Endorsed: Filed in District Court on May 25, 1931.

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Motion of the Defendants, Sam Hawks, J. F. McKeel, and Lew Wentz, Constituting the State Highway Commission of Oklahoma; and J. Berry King, Attorney General of Oklahoma, to Dismiss the Bill of Complaint.

Come now the defendants, Sam Hawks, J. F. McKeel, and Lew Wentz, constituting the State Highway Commission of Oklahoma, and J. Berry King, Attorney General of Oklahoma, and move the court to dismiss the bill of complaint herein upon the following grounds:

I.

That the movants herein are officers of the executive branch of State Government of Oklahoma, and that this is a suit against the State of Oklahoma, and that the State of Oklahoma has not consented to be sued, as provided in the Eleventh Amendment to the United States Constitution.

II.

That the bill of complaint does not state facts sufficient to entitle the complainants to any relief, there being no equity stated in the bill.

III.

That the defendants, Sam Hawks, J. F. McKeel, and Lew Wentz, constituting the State Highway Commission of Oklahoma, and J. Berry King, Attorney General of Oklahoma, are officers of the executive branch of the State Government of Oklahoma, and any action taken by them as such officers is and would be in behalf of the Sovereign State of Oklahoma, and that the State of Oklahoma is not a citizen within the meaning of the Judiciary Acts of the United States of America which authorize suits in the Federal Courts on the ground of diverse citizenship.

Wherefore, said defendants pray that the bill of complaint filed herein may be dismissed.

J. Berry King,
Attorney General of the State of Oklahoma.

W. C. Lewis,
Assistant Attorney General,

Solicitors for Defendants, Sam Hawks
J. F. McKeel and Lew Wentz.

Endorsed: Filed in District Court on May 25, 1931.

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[Opinion.]

In Equity. Complainants by their bill seek an injunction against defendants to enjoin them from interfering with complainants operating and collecting tolls upon a bridge over the South Canadian River between McClain and Cleveland Counties, Oklahoma. Application for temporary injunction denied, and complainants' bill dismissed.

Mr. C. B. Cochran (Ames, Cochran, Ames & Monett, of

counsel), all of Oklahoma City, Oklahoma, for the complainants.

Mr. J. Berry King, Attorney General, and Mr. W. C. Lewis, Assistant Attorney General, of Oklahoma City, Oklahoma, for the defendants.

Kennamer, District Judge: The exhibits to the petition show that Carter, et al., filed applications with the Boards of County Commissioners of Cleveland and McClain Counties for permission to construct a bridge over the South Canadian River and to collect tolls. The Board of County Commissioners of McClain County on the 22nd day of April, 1911, passed a resolution making the grants as prayed for; and the Board of County Commissioners of Cleveland County on the 16th day of May, 1911, did likewise. The grants in both resolutions are perpetual, subject to such limitations as are by law now or may hereafter be provided. Both resolutions further provide that the grants are assignable to any individual or corporation.

The McClain County resolution also provides that the bridge shall be erected within the time provided by law or else the authority granted shall lapse. The Cleveland County grant authorizes the grantees to use so much of the public highway as may be necessary. It is expressly provided that neither grant shall be exclusive. In both grants, reference is made to the "Bridge Company."

There is also attached to the complainants' petition an assignment to a Bridge Company of all the rights acquired by Carter, et al., by virtue of the grants from the counties, together with that portion of the bridge which it is recited was then in process of construction and which was later completed by the corporation.

I am unable to find in the statutes any section expressly authorizing the construction of bridges within the state by individuals, but Article 6 of Chapter 34, C. O. S. 1921, provides for the incorporation of Bridge Companies.

Section 5366, C. O. S. 1921, limits the term of existence of

such corporations to twenty years and provides further that the articles of incorporation shall give the location of the bridge and shall state if the corporation owns the banks on both sides of the stream; and if it does not own such banks, that it has obtained the consent of the owners thereof to the erection of the bridge; or if the banks at such places are included within and are a part of a public highway, that the consent of the Board of County Commissioners has been obtained.

Section 5367, C. O. S. 1921, is as follows:

> "No such corporation shall construct or take tolls on a bridge until authority is granted therefor by the board of county commissioners of the county or counties in which it is to be located."

Section 5368, C. O. S. 1921, provides that the corporate existence of a bridge company shall terminate unless it has obtained from the board of county commissioners the authority mentioned in Section 5367, and unless it has within one year commenced the construction of its bridge. The second paragraph of this section provides that its corporate existence shall terminate if the bridge is not completed within three years from the issuance of the corporation's charter.

It is clear from a consideration of Sections 5366 and 5367 that the latter section is a limitation upon the power of the corporation created under the authority of Section 5366. Such corporation is not authorized after the construction of such bridge to collect tolls unless it obtains authority from the County Commissioners of the county where such bridge is located, and it is quite plain authority to collect tolls cannot be extended by the County Commissioners granting such authority beyond the life of the corporation. This, for the reason it is only corporations chartered for a period of twenty years that have authority from the sovereign to build and construct and operate toll bridges over the streams of the State, and the authority is limited in time to twenty years to such corporation, and it is beyond the power of the County Commissioners to authorize the collection of tolls

by such corporations beyond the period of limitation fixed by the Legislature.

Article 18, Chapter 34, C. O. S. 1921, provides for the incorporation of Wagon Road Corporations.

Section 5625, C. O. S. 1921, states that the road must be laid out as follows:

> "Three commissioners appointed as specified must lay out the proposed road and report their proceedings, accompanied by a map, to the board of county commissioners."

Section 5626, C. O. S. 1921, provides that the report must give the road's general course, the principal points thereon, its width, and the same must then be either approved or rejected by the board of county commissioners.

Section 5627, C. O. S. 1921, provides that Wagon Road Corporations may keep ferries or establish bridges on the line of their road and that they may take only such tolls on their roads, ferries or bridges as are fixed by the board of county commissioners of the county through which the road passes, or in which the ferry or bridge is situated.

Section 5636, C. O. S. 1921, reads as follows:

> "When a wagon, turnpike or plank road is constructed, owned or operated by any natural person, this article is applicable to such person in like manner as it is applicable to corporations."

It is obvious from the grants that the grantees were not endeavoring to proceed under the wagon road incorporation article. Nothing is said therein with reference to the commissioners, the survey or anything about a road. This article clearly contemplates that bridges and ferries which may be established are for the purpose of connecting two sections of the road or are for the purpose of providing access to the road.

It would seem to be quite clear from the grants that an effort was made to comply with the Bridge Corporation ar-

ticle. No reference is made in either grant to any permission to construct a road. A bridge alone is referred to, and the grants from the Commissioners contain express authority to collect tolls as is provided in Section 5367, C. O. S. 1921.

It is set forth in the bill of complaint that this right to take tolls was granted to individuals, who in turn assigned the same to a corporation, which constructed the bridge and which prior to the expiration of its charter conveyed the bridge, together with the right to take tolls, to complainants. The grant to the individuals undoubtedly from the allegations of the bill and the evidence introduced on the hearing was taken and held in trust for the corporation which they later formed on May 18, 1911. The right to take toll would, of course, never amount to anything unless the bridge was completed.

It is, of course, axiomatic that the board of county commissioners have no inherent powers and that the powers granted to them by the legislature are to be strictly construed.

Counsel for the complainant in his brief and on the oral argument relies upon the case of *Postal Bridge Co.* v. *The State ex rel. Dabney, Attorney General* (Okla.), 282 Pac. 462, to sustain his contention that a franchise may be granted to an individual to own and operate a toll bridge in the State of Oklahoma, and that the decision is binding upon the Federal Courts construing a State statute. The case is not authority for this contention. In this case the De Luxe Bridge Co. was granted a charter on the 14th day of January, 1920, amended November 29, 1920, as a toll bridge corporation to construct such bridge at Bridgeport, in Blaine County, Oklahoma. It obtained a franchise from the Board of County Commissioners of Blaine County authorizing it to collect tolls from such bridge. The De Luxe Bridge Co. sold and assigned its franchise to operate the bridge to the Postal Bridge Co. long prior to the expiration of its corporate charter. The Postal Bridge Co. was not a corporation, but an express trust. The State instituted its suit to en-

join the Postal Bridge Co. from operating the toll bridge and collecting tolls, alleging that said De Luxe Bridge Co. was not authorized to own a franchise and to operate a toll bridge within the State of Oklahoma, and for that reason did not have any franchise or right that could be assigned or sold to the Postal Bridge Co., and that the Postal Bridge Co. was unauthorized to operate said toll bridge. It was held that a corporation having a franchise to operate a toll bridge could sell and assign such franchise to an express trust or an individual, and the corporate entity of such toll bridge corporation could not be collaterally attacked; that there is no inhibition to be found in the Constitution and statutes of Oklahoma against a toll bridge corporation from selling its secondary franchise, subject to the conditions and requirements contained in said franchise. The case is not authority sustaining the power of the County Commissioners to grant and collect tolls upon a toll bridge built over the streams of the State.

It is provided in Section 10,104, C. O. S. 1921, that County Commissioners may grant to individuals as well as corporations authority to construct bridges over a stream which constituted a state boundary line.

However, it will be observed from the sections referred to that the legislature very clearly distinguished between bridges located wholly within the state and those over streams constituting boundaries. The bridge in question over the South Canadian River lies wholly within the State of Oklahoma, and the County Commissioners of McClain and Cleveland Counties were without authority to grant to Carter et al. a franchise to take toll unless the grants were taken for the benefit of the bridge corporation which they immediately formed. This, in my opinion, was the case. This conclusion is emphasized still further by the fact that in each grant "Bridge Company" is referred to.

Counsel for complainants have referred to the case of *Grove Bridge Co.* v. *State,* 271 Pac. 846. The grant in this case was to individuals, as was permissible under the Arkansas law in force in the Indian Territory at the time of the grant.

In *Gibson* v. *Rogers County*, 181 Pac. 720, the plaintiff in error was proceeding under the Wagon Road incorporation article and not under the Bridge incorporation article.

In my opinion, it is clear that the original grantees herein were endeavoring to proceed under the Bridge Corporation article, preparatory to the formation of a corporation.

Having reached the conclusion that the franchise to take tolls has expired, it next becomes necessary to determine what becomes of a toll bridge upon the expiration of the franchise to take toll. This question has been passed on by the Supreme Court of Oklahoma in the case of *Grove Bridge Co. et al.* v. *State ex rel.*, 271 Pac. 846, and *Postal Bridge Co.* v. *State ex rel.*, 282 Pac. 462, which hold that the bridge then becomes the property of the State. It is quite clear from the authorities generally that upon the expiration of a toll franchise that the use of a bridge is free to the citizens of the state, just as other public highways. Mr. Justice Brewer, while a member of the Supreme Court of Kansas, in the case of *State ex rel.* v. *Lawrence Bridge Co.*, 22 Kan. 438, 463, stated the applicable rule, as follows:

> "For I agree with the Chief Justice that the bridge is a permanent structure on the public highway and under the authorities when the franchise to take toll ceases, the right of the public to use the bridge free from any burden of tolls attaches without any right on the part of the builders to remove the structure and destroy the highway. The right to take tolls for a specific number of years was the consideration granted by the public to the defendants for the privilege of placing this improvement on the highway, and the former owners have now no more right to remove the bridge than the owners of a turnpike to tear it up after the franchise to take tolls has ceased."

The opinion of the Chief Justice in the foregoing case is well worthy of consideration, and shows clearly that such a conclusion works no hardships on the owners of the bridge, who, as is true in the instant case, have very probably long

since been repaid many times over the cost of the construction and maintenance of the structure.

See also *Virginia Canon Toll Road Co.* v. *People*, 45 Pac. 398; *State ex rel.* v. *Scott County Road Co.*, 105 S. W. 752; *Rockwith* v. *State Road Bridge Co.*, 108 N. W. 785; *People ex rel.* v. *Anderson and U. Valley Road Co.*, 18 Pac. 308; *Grand Rapids Bridge Co.* v. *Prange*, 35 Mich. 404.

Numerous cases to the same effect are referred to in the brief of defendant in error in the case of *Scott County Road Co.* v. *State ex rel.*, 215 U. S. 336-338.

I am of the opinion that where the Bridge Corporation article was endeavored to be followed that the Board of County Commissioners could not grant a toll franchise for more than twenty years. The grants involved herein read as follows:

> "That the grants herein made shall be perpetual, subject only to such limitations as is by law now, or may hereafter, be provided."

This grant, of course, must be read in connection with the authority of the Boards of County Commissioners. In *City of Okmulgee* v. *Okmulgee Gas Co.*, 282 Pac. 640, the Supreme Court of Oklahoma held that a perpetual franchise would violate the perpetuity section of the State Constitution.

Endorsed: Filed in District Court on June 1, 1931.

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Decree.

This cause came on regularly for hearing on complainants' application for a temporary injunction on May 25, 1931, and the complainants appeared by their attorney, C. B. Cochran; the defendants, J. Berry King, Attorney General of Oklahoma, and Sam Hawks, J. F. McKeel and Lew Wentz, constituting the State Highway Commission of Oklahoma, appeared by W. C. Lewis, Assistant Attorney General, and the defendants, Person Woodall, J. C. Todd, George Carpenter and George N. Church, appeared by their attorney, Person Woodall, and the defendants, Purman Wilson,

J. R. Evatt, A. O. Maddox and J. E. Colbert, appeared by their attorney, Purman Wilson. Thereupon the complainants asked permission to file an amendment to the bill of complaint, and permission was granted to file the same instanter.

Thereupon the defendants filed motions to dismiss the bill of complaint, and, by agreement of counsel for the respective parties, in open court, notice of the hearing on the motion to dismiss was waived and the court proceeded to hear said motion immediately. After hearing argument of counsel, the court continued the hearing until May 29, 1931, and ordered that the restraining order heretofore granted in this case be continued in force until that time.

Now on this 29th day of May, 1931, this cause coming on for further hearing on the defendants' motions to dismiss, and the court being well and sufficiently advised, sustains each of said motions to dismiss for the reason that the bill of complaint does not state facts sufficient to entitle the complainants to relief in equity, to which action of the court the complainants except.

It is therefore Ordered, Adjudged and Decreed that the motions to dismiss filed herein by the defendants be, and the same are, hereby sustained, and the bill of complaint is hereby dismissed for the reason that the same does not state facts sufficient to entitle the complainants to relief in equity, and the suit is accordingly dismissed at complainants' costs, to which action of the court complainants, and each of them, except, and in open court give notice of appeal to the Circuit Court of Appeals for the Tenth Circuit. The complainants further petitioned the court to preserve the status quo of the property and the operation of the toll bridge during the pendency of the appeal, in order to prevent irreparable injury to the complainants. Pursuant to agreement of the attorneys for the respective parties, in open court, and for the purpose of protecting the rights of all of the parties during the pendency of the appeal;

It is by the Court Ordered, Adjudged and Decreed that Dorset Carter, J. E. Colbert and J. C. Todd are hereby ap-

pointed Trustees, and are authorized and directed to operate the Purcell-Lexington toll bridge and collect the tolls fixed by the last order of the Corporation Commission of the State of Oklahoma from persons using said toll bridge; that said Trustees shall receive no compensation for their services, but they are authorized to pay from the funds so collected the salary of one chief toll collector in the sum of $125.00 per month, and three assistant toll collectors at a salary of $100.00 per month each, and they are further authorized to pay from the funds the cost of printing toll receipts, tickets, blank reports, premiums on bonds for toll collectors, necessary postage, and necessary repairs on the bridge, but no other payments shall be made from said funds except on order of this court.

Frank Claunch is hereby designated chief toll collector, and Tom Keller, John Kemp and A. G. Jennings are designated assistant toll collectors, and no change shall be made in such chief toll collector and assistant toll collectors, or any vacancy filled, except by the unanimous agreement of the Trustees, and if they fail to unanimously agree, the matter shall be submitted to this court for an appropriate order.

It is further ordered that the said Trustees shall begin the collection of tolls on said bridge on June 1, 1931, and shall continue to operate said bridge and collect said tolls, and hold the funds so collected, less the expenses above authorized and such other expenditures as may be authorized by order of this court, during the pendency of the appeal herein and until final determination thereof; upon final determination of said appeal, the funds shall be disbursed under order of this court.

It is further ordered that said Trustees shall deposit the funds so collected in the joint names of said Trustees in Purcell Bank & Trust Company of Purcell, Oklahoma, and/or Security National Bank of Norman, Oklahoma, said deposits to be secured by surety company bonds, or United States Government bonds.

It is further ordered that said Trustees shall cause to be printed receipts which shall be delivered by the toll collectors

to the persons paying toll for the use of said bridge, which receipts shall recite as follows:

"If upon final order of the United States District Court for the Western District of Oklahoma, it shall be determined that the tolls set out on the reverse side of this receipt were exacted and collected without authority of law, or that the bridge for which the toll paid and represented by this receipt was a public bridge, disburdened of toll, the purchaser hereof, or the holder or owner of the same, will upon surrender and cancellation thereof, within six months from the date of such final order or judgment, be entitled to a refund of the amount paid, less the pro rata part of the expenses of the operation of the bridge.

"The bridge is operated by trustees under an order of court pending the final disposition of the case, and operating expenses of the bridge will be paid from the funds received as tolls.

"If this receipt is lost, you may not participate in the refund."

Dated this 29th day of May, 1931.

F. E. Kennamer, District Judge.

O.K.—J. Berry King, Atty. Genl of Oklahoma. By W. C. Lewis, Asst. Atty. Genl.

Endorsed: Filed in District Court on May 29, 1931.

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In the District Court of the United States for the Western District of Oklahoma.

Charles H. Hamill et al., Complainants, vs. Sam Hawks et al., Defendants. No. 1224—Equity.

Petition to Appeal.

Charles H. Hamill and Willoughby G. Walling, who are complainants in the above entitled cause, conceiving them-

selves aggrieved by the decree entered herein on the 29th day of May, 1931, do hereby appeal from the said decree to the United States Circuit Court of Appeals for the Tenth Circuit, for the reasons specified in the assignments of error which is filed herein, and pray that this appeal may be allowed, and that citation issue as provided by law.

Petitioners further pray that an order of supersedeas may be entered herein pending final disposition of the cause, and that the amount of security may be fixed by the order allowing this appeal.

Petitioners show that unless an order is entered herein providing for the operation of the toll bridge and the collection of tolls, and an impounding of the funds so collected pending the appeal herein, irreparable injury and damage will be sustained by the complainants, and complainants pray that this court enter a proper order protecting the rights of the parties pending the appeal.

Charles B. Cochran,
Attorney for Complainants.

Ames, Cochran, Ames & Monnet,
of Counsel.

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On this June 4th, 1931, it is ordered that the appeal be allowed as prayed for, and supersedeas bond is fixed in the sum of $500.00.

F. E. Kennamer,
United States District Judge.

Endorsed: Filed in District Court on June 4, 1931.

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Assignment of Errors.

Now come the appellants, Charles H. Hamill and Willoughby G. Walling, by Charles B. Cochran, their attorney, and in connection with their petition for appeal, say that in the record, proceedings and in the final decree aforesaid

manifest error has intervened to the prejudice of the appellants, to wit:

I.

The court erred in holding that the bill of complaint does not state facts sufficient to entitle complainants to relief in equity, and in sustaining the defendants' motions to dismiss the bill of complaint and entering a decree dismissing the case at complainants' costs.

II.

The court erred in holding that the franchise to take tolls on Purcell-Lexington toll bridge has expired.

III.

The court erred in holding that the Boards of County Commissioners could not grant a toll franchise for more than twenty (20) years.

IV.

The court erred in holding that the County Commissioners of McClain and Cleveland Counties were without authority to grant to Carter et al. a franchise to take toll unless the grants were taken for the benefit of the bridge corporation which they immediately formed.

V.

The court erred in holding that the bridge has become the property of the State, and that the citizens of the State are entitled to the free use of the same as other public highways.

VI.

The court erred in refusing to hold that the complainants are the owners of the bridge and that the same cannot be used or taken for the public without compensating complainants therefor.

Wherefore, appellants pray that the decree of the District Court for the Western District of Oklahoma may be reversed

and remanded with directions to proceed in accordance with the law.

Charles B. Cochran,
Attorney for Petitioners and Appellants.

Ames, Cochran, Ames & Monnet,
of Counsel.

Endorsed: Filed in District Court on June 4, 1931.

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Order Allowing Appeal.

The petition of Charles H. Hamill and Willoughby G. Walling, the complainants in the above entitled cause, for an appeal from the final decree entered herein, is hereby granted and the appeal is allowed; and upon the petitioners filing a bond in the sum of $500.00, with sufficient security and conditioned as required by law, the same shall operate as a supersedeas over the decree granted and entered in the above cause until the termination of said appeal by the United States Circuit Court of Appeals for the Tenth Circuit.

It is further ordered that the Trustees appointed herein on the 29th day of May, 1931, to operate Purcell-Lexington toll bridge and to collect tolls therefrom, shall continue to operate said toll bridge and to collect tolls therefrom, and handle the funds so collected during the pendency of this appeal and until the final determination thereof, in accordance with the terms of the order entered herein on May 29, 1931.

June 4, 1931.

F. E. Kennamer,

Judge of the United States District Court
for the Western District of Oklahoma.

Endorsed: Filed in District Court on June 4, 1931.

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[Bond on appeal in the sum of $500, approved by the Dis-

trict Judge, with appellants as principals and Aetna Casualty and Insurance Company of Hartford, Conn., as surety, was filed in the District Court on June 15, 1931.]

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Praecipe for Transcript.

To the Honorable Clerk of Said Court:

The Clerk of the United States District Court for the Western District of Oklahoma is hereby notified that the appellants, Charles H. Hamill and Willoughby G. Walling, desire the following instruments and orders incorporated into the transcript on appeal herein to the United States Circuit Court of Appeals for the Tenth Circuit, to wit:

Bill of Complaint;

Amendment to Bill of Complaint;

Temporary Restraining Order;

Bond for Temporary Restraining Order;

Motions to Dismiss;

Final Decree;

Written Opinion of the Court;

Petition for Appeal;

Order Allowing Appeal;

Assignment of Errors;

Citation;

Praecipe for Transcript;

Bond on Appeal.

Appellants request the record be printed under the direction of the Circuit Court of Appeals for the Tenth Circuit.

Charles B. Cochran,
Attorney for Appellants.

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Service of praecipe for transcript of record herein accepted this 18th day of June, 1931.

W. C. Lewis,

Attorney for Sam Hawks, J. F. McKeal and Lew Wentz, constituting the State Highway Commission of Oklahoma, and J. Berry King, Attorney General of Oklahoma.

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Service of praecipe for transcript of record herein accepted this 16 day of June, 1931.

Purman Wilson,

Attorney for Defendant, Purman Wilson, County Attorney of McClain County, Oklahoma, J. R. Evatt, A. O. Maddox and J. E. Colbert.

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Service of praecipe for transcript of record herein accepted this 16 day of June, 1931.

Person E. Woodall,

Attorney for Defendant, Person Woodall, County Attorney of Cleveland County, Oklahoma, J. C. Todd, George Carpenter and George N. Church.

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Endorsed: Filed in District Court on June 18, 1931.

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(Clerk's Certificate to Transcript.)

United States of America, Western District of Oklahoma, ss.

I, Theodore M. Filson, Clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the above and foregoing to be a full, true

and complete transcript of the pleadings, record and proceedings, in said court, in case No. 1224, Equity, wherein Charles H. Hamill and Willoughby G. Walling, are complainants, and Sam Hawks, J. F. McKeal and Lew Wentz, constituting the State Highway Commission of Oklahoma, and others, are defendants, as full, true and complete as the said transcript purports to contain and as called for by the praecipe for transcript of the record above set forth.

I further certify that the original citation is hereto attached and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the City of Oklahoma City, in said District, this 23rd day of June, A. D. 1931.

Theodore M. Filson, Clerk,
By Grace G. Butler, Deputy.

(Seal)

Filed June 29, 1931. Albert Trego, Clerk.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz.:

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Petition for Writ of Certiorari for Diminution of the Record.

Filed Oct. 15, 1931.

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Tenth Circuit:

The petition of Sam Hawks, J. F. McKeel and Lew Wentz, constituting the State Highway Commission of Oklahoma; and J. Berry King, Attorney General of Oklahoma; Purman Wilson, County Attorney of McClain County, Oklahoma; Person Woodall, County Attorney of Cleveland County, Oklahoma; and J. R. Evatt, A. O. Maddox, J. E. Colbert, J. D. Todd, George Carpenter and George N. Church, respectfully show:

First: That heretofore on May 29, 1931, a decree in equity was duly entered in the office of the clerk of the United States District Court for the Western District of Oklahoma, which said decree directed, among other things, that the motions to dismiss the bill of complaint filed therein by the defendants be, and the same were sustained and the bill of complaint was dismissed; a copy of said decree is set forth on pages 37 to 39, inclusive, of the transcript of the record filed in this court; that on the first day of June, 1931, Hon. F. E. Kennamer, District Judge, filed in the office of the clerk of the United States District Court for the Western District of Oklahoma, his written opinion setting forth the reasons for sustaining the motion of the defendants to the bill filed by the plaintiffs; a copy of said opinion is found on pages 30 to 36, inclusive, of the transcript of the record on file herein. Subsequently proceedings were taken by said plaintiffs which were claimed by said plaintiffs to constitute an appeal to this honorable court from said decree; and at some time subsequent to June 29, 1931, what purports to be a transcript of the record below as filed in this court and said alleged transcript has been printed under the direction of said plaintiffs for use in this court upon said alleged appeal. Said alleged

appeal has not yet been dismissed and has not yet been determined.

Second: Said paper, which purports to be a transcript of said record, omits a certain portion of the same, to-wit the testimony introduced in support of the motion to dismiss said cause; and also the application of the defendants for an order approving transcript of the testimony introduced by defendants and directing the filing thereof with the court clerk and further directing the clerk to transmit the same to the clerk of the Circuit Court of the Tenth Circuit; the notice of the presentation thereof and proof of service of the same, and the order made by the Hon. Judge Kennamer upon said application.

Third: These petitioners would further show to this honorable court that at the time said cause was heard before the trial judge and at the time of the rendition of the decree by said judge, their attorneys requested Mr. E. P. Huff, the court reporter who was appointed to take the evidence at the hearing upon the motion to dismiss filed by the defendants, to prepare a transcript of the evidence so taken for filing as a part of the original record in the trial court. That said reporter did transcribe the testimony so introduced but not until after statutory time within which the defendants could file a praecipe for an amended or supplemental transcript of the record, and the attorneys for these petitioners endeavored to secure a stipulation for abridgement of said testimony from the attorneys for the plaintiffs, but that they refused to stipulate upon the ground that the same was not necessary to a decision by this honorable court. That thereafter these petitioners, by their attorneys, filed a written application with Hon. F. E. Kennamer, trial judge, asking that the testimony so transcribed be approved by the court, and directing the court clerk to file the same. That notice of said hearing was given to the attorneys for the plaintiffs and upon hearing, the Hon. F. E. Kennamer entered an order approving the testimony so transcribed, directing that the same be filed with the clerk of the United States District Court for the Western District of Oklahoma, and that the same be thereafterwards forwarded to the clerk of this honorable court.

Fourth: That the honorable judges of this court in reading the opinion heretofore referred to herein, which appears on pages 30 to 36, inclusive, of the transcript of the record on file in this court, will find on page 32 thereof that the trial court considered certain evidence introduced by the defendants upon the hearing of the motions to dismiss as appears in the fifth paragraph on page 33 of the transcript of the record, and in order for this honorable court to have before it the entire record upon which the trial judge rendered his opinion and decree, the testimony or an abridgement thereof should be printed as an amendment to the transcript of the record filed by the appellants herein.

Fifth: Petitioners would further show that should an application be made to the Supreme Court of the United States by the appellants herein for a review of the final decision of this honorable court upon said alleged appeal, there is danger lest it may be claimed by said appellants herein that the court did not consider the testimony introduced by defendants upon the motions to dismiss the bill of plaintiffs in support of their opinion and decree, wherein the motions of the appellants herein, defendants below, to dismiss the bill of complaint of the plaintiffs, were sustained; which position your petitioners wish to be allowed to dispute.

Sixth: That the appellants herein have filed their brief with this honorable court, and the appellees have refrained from filing a brief up to this time with a view of seeking to stipulate on an abridgment of the testimony introduced upon the hearing of the motions to dismiss the bill of complaint, but that they have been unable to agree with the attorneys for the appellants for an abridgment as aforesaid. That in order to prepare their brief the appellees should have the transcript of the record completed so as to show the facts in connection with said trial.

Seventh: That by reason of the above and foregoing, the petitioners have not been able to comply with the rules and regulations of this honorable court with reference to filing praecipe for amendment to the transcript of the record and other rules concerning motions for writs of certiorari, all of

which were not occasioned by the negligence of the petitioners herein, or their attorneys.

Wherefore, your petitioners pray that a writ of certiorari for *dimunition* of the record issue to the clerk of the United States District Court for the Western District of Oklahoma directing him to certify to this court at the expense of the appellees herein, the testimony introduced for the defendants in the trial below, in support of the motions to dismiss the bill of the plaintiffs or an abridgment thereof, and also the application of the defendants for an order approving transcript of the testimony introduced by defendants and directing the filing thereof with the court clerk and further directing the clerk to transmit the same to the clerk of the Circuit Court of the Tenth Circuit; the notice of the presentation thereof and proof of service of the same, and the order made by Hon. Judge Kennamer upon said application. That the appellees herein, defendants below, may be permitted to pay to said clerk the expense of certifying said testimony, and other records referred to herein, and also the printing of the same, and that your petitioners may have such other and further relief in the premises as may be just.

SAM HAWKS, J. F. McKEEL
and LEW WENTZ,
constituting the State Highway
Commission of Oklahoma; and

J. BERRY KING,
Attorney General of Oklahoma;

PURMAN WILSON,
County Attorney of McClain
County, Oklahoma;

PERSON WOODALL,
County Attorney of Cleveland
County, Oklahoma; and

J. R. EVATT, A. O. MADDOX,
J. E. COLBERT, J. C. TODD,
GEORGE CARPENTER and
GEORGE N. CHURCH,
By J. BERRY KING,
Attorney General of Oklahoma.

And W. C. LEWIS,
Assistant Attorney General.

And PURMAN WILSON,
County Attorney of McClain County, Okla.

And PERSON WOODALL,
County Attorney of Cleveland County, Okla.
Attorneys and Solicitors for Petitioners.

State of Oklahoma, County of Oklahoma, ss.

J. Berry King, Attorney General of Oklahoma, being first duly sworn, says: That he is one of the petitioners above named; that he has read the above and foregoing petition and knows the contents thereof, and that the matters and facts therein set forth are true.

J. BERRY KING,
Attorney General of Oklahoma.

Subscribed and sworn to before me this the 13th day of October, 1931. Effa Alexander, Notary Public. (Seal) My commission expires October 28, 1932.

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(Order.)

Twenty-third Day, September Term, Saturday, October 17th, A. D. 1931.

Before Honorable John H. Cotteral and Honorable Orie L. Phillips, Circuit Judges.

This cause came on to be heard on the petition of appellees for a writ of certiorari for diminution of the record and was submitted to the court.

On consideration whereof, and for good cause shown, it is now here ordered by the court that said petition be and the same is hereby granted.

It is further ordered by the court that if within fifteen days from this day the clerk of the District Court of the United States for the Western District of Oklahoma has not

transmitted to this court a certified transcript and copy of the following parts of the record alleged to have been omitted from the transcript of the record on the appeal of this cause from said United States District Court, to-wit:

The testimony introduced by the defendants in the trial below in support of the motions to dismiss the bill of the plaintiffs, or an abridgment thereof,

The application of the defendants for an order approving transcript of the testimony introduced by defendants and directing the filing thereof with the clerk and further directing the clerk to transmit the same to the clerk of the United States Circuit Court of Appeals for the Tenth Circuit,

The notice of the presentation thereof and proof of service of the same, and

The order made by Honorable F. E. Kennamer, United States District Judge, upon said application,

or shown cause why he is unable to do so, the said writ shall then issue.

It is further ordered by the court that, upon receipt from the clerk of the said District Court of a certified transcript and copy of the parts of the record from the court below hereinabove mentioned, with the testimony therein stated in narrative form as required by Equity Rule 75, the same be filed and printed in conformity with the rules of this court and considered by the court as a part of the transcript of the record in this cause.

It is further ordered by the court that the clerk of this court forthwith transmit to the clerk of the United States District Court for the Western District of Oklahoma a certified copy of this order.

# ADDITIONAL TRANSCRIPT OF RECORD.

## United States Circuit Court of Appeals
TENTH CIRCUIT.

No. 511

CHARLES H. HAMILL and WILLOUGHBY G. WALLING, APPELLANTS,

vs.

SAM HAWKS, J. F. McKEAL and LEW WENTZ, Constituting the State Highway Commission of Oklahoma; and J. BERRY KING, Attorney General of Oklahoma; PURMAN WILSON, County Attorney of McClain County, Oklahoma; PERSON WOODALL, County Attorney of Cleveland County, Oklahoma, and J. R. EVATT, A. O. MADDOX, J. E. COLBERT, J. C. TODD, GEORGE CARPENTER and GEORGE N. CHURCH, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

FILED NOV. 2, 1931.

In the District Court of the United States for the Western District of Oklahoma.

Pleas and proceedings before the Honorable F. E. Kennamer, Judge of the Northern District of Oklahoma, sitting by assignment in the Western District of Oklahoma, and presiding in the following entitled cause:

Charles H. Hamill and Willoughby G. Walling, Complainants, vs. Sam Hawks, J. F. McKeal and Lew Wentz,

constituting the State Highway Commission of Oklahoma; and J. Berry King, Attorney General of Oklahoma; Purman Wilson, County Attorney of McClain County, Oklahoma; Person Woodall, County Attorney of Cleveland County, Oklahoma; and J. R. Evatt, A. O. Maddox, J. E. Tolbert, J. C. Todd, George Carpenter and George N. Church, Defendants.—Equity No. 1224.

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Application for Order Approving Transcript of Testimony introduced by defendants and directing filing thereof with Court Clerk and further directing the Clerk to transmit the same to the Clerk of the Circuit Court of Appeals of the Tenth Circuit.

Comes now W. C. Lewis, Assistant Attorney General of the State of Oklahoma, attorney for the defendants, the State Highway Commission of the State of Oklahoma and J. Berry King, Attorney General of Oklahoma, and moves this Honorable Court for an order approving the transcript of testimony introduced in said case and directing the filing of the same with the clerk of the United States District Court for the Western District of Oklahoma, and further ordering the clerk of said District Court to transmit the same to the clerk of the Circuit Court of Appeals of the Tenth *District* at Denver, Colorado, and as grounds therefor states:

I.

That at the trial of said cause before Honorable F. E. Kennamer, United States District Judge, the defendants introduced certain testimony in support of the motion filed by them asking the dismissal of the plaintiff's bill of complaint which is referred to in the written opinion of said District Judge filed in said cause and now appearing on page 33 of the transcript of record filed by the appellants, wherein the court stated:

> "The grant to the individuals undoubtedly from the allegations of the bill and the evidence introduced on the hearing was taken and held in trust for the corporation which they later formed on May 18, 1911. The right to

take toll would, of course, never amount to anything unless the bridge was completed."

And said Judge in his written opinion also stated therein, as appears on page 35 of the transcript of record filed as aforesaid:

"In my opinion, it is clear that the original grantees herein were endeavoring to proceed under the Bridge Corporation article, preparatory to the formation of a corporation."

II.

That under Equity Rule No. 75 of the Supreme Court of the United States, by which the Circuit Court of the Tenth Circuit of the United States is governed, it was and is the duty of the defendants to file a praecipe for additional portions of the record omitted by the appellants, within ten (10) days after the praecipe filed by the appellants; that the defendants were precluded from filing said praecipe with the clerk for the reason that the reporter who reported the proceedings did not transcribe and file with the clerk a transcript of the evidence introduced by the defendants at said trial within said period of ten (10) days, and in fact the same has not been filed at this time but was certified to by Mr. E. P. Huff, Reporter, under date of August 27, 1931, and that under the law the defendants believe the same is not permitted to be filed in said court until the same is presented to the trial judge and is by him approved, and thereafter when same is approved it must be filed in the clerk's office and become a part of the records for the purposes of the appeal.

That on the date of the rendition of the judgment by the Honorable F. E. Kennamer, the attorneys for the defendants requested the reporter to transcribe the shorthand notes containing the evidence introduced by the defendants in support of the motion to dismiss, and subsequent to said oral request directed the transcription of the same by letter;

That the State of Oklahoma has paid the fee for services of said reporter and has now in its possession the original and one copy of the transcribed testimony and desires to present it to this Honorable Court for examination and approv-

al; that a certified copy of said testimony was furnished to Honorable C. B. Cochran, attorney for the plaintiffs, on August 28, 1931; that on the presentation of said certified transcript of the testimony to the Honorable C. B. Cochran, the attorneys for the defendants sought to procure a stipulation to the effect that the same might be transmitted to the Circuit Court of Appeals for the Tenth Circuit, but that said C. B. Cochran refused to stipulate and indicated he would oppose any effort made by the attorneys for the defendants to incorporate said testimony as a part of the record.

That under the law and Supreme Court Equity Rule No. 15, which corresponds to a rule of the Circuit Court of Appeals of the Tenth Circuit, no writ of certiorari for diminution of the record will be awarded in any case, unless a printed motion therefor shall be made, and the facts on which the same is founded shall be shown, if not admitted by the other party by affidavit.

III.

That in order for the Circuit Court of Appeals to have the benefit of the evidence in connection with the opinion and decree of Honorable F. E. Kennamer, assigned Judge, and to determine whether or not the said Judge erred in his decree and holding, it is necessary that said Circuit Court have the benefit of the testimony introduced in support of the motion.

IV.

A certified copy of said testimony is attached hereto, made a part hereof, and for identification is marked Exhibit A.

V.

Defendants further represent that they desire to have the record filed with the clerk of the United States District Court for the Western District of Oklahoma for the purpose of predicating a petition for certiorari for diminution of the record to the Circuit Court of Appeals of the Tenth Circuit of the United States.

VI.

Defendants further represent to this Honorable Court that

notice of filing of this application has been served upon the attorneys for the plaintiffs as appears by acceptance of service attached hereto, marked Exhibit B, and made a part hereof.

Wherefore, these defendants pray this Honorable Court to make an order approving the transcript of the testimony attached hereto as Exhibit A and direct the filing thereof by the clerk of the United States District Court for the Western District of Oklahoma, and further directing the clerk to transmit the same as a part of the original files to the clerk of the Circuit Court of Appeals for the Tenth *District* of the United States, to be used in connection with the appeal perfected by the plaintiffs.

W. C. Lewis,
Assistant Attorney General,
Attorney for Defendants.

State of Oklahoma, Oklahoma County, ss.

W. C. Lewis, Assistant Attorney General of the State of Oklahoma, of lawful age and being duly sworn, upon oath states that he has read the above and foregoing application, knows the contents thereof, and that the matters and facts therein set forth are true.

W. C. Lewis.

Subscribed and sworn to before me this 29 day of August, 1931. Effa Alexander, Notary Public (Seal). My commission expires Oct. 28, 1932.

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[Exhibit A.]

Narrative Statement of Evidence.

Be It Remembered:

That the above cause came on regularly for hearing on complainants' application for temporary injunction on May

25th, 1931, and the following evidence was offered and introduced:

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Complainants offered in evidence a verified Bill of Complaint.

Complainants offered in evidence the following affidavit of Dorset Carter (omitting caption and verification):

"Dorset Carter, being first duly sworn, on oath states as follows:

On the 22nd day of April, 1911, the County Commissioners of McClain County, Oklahoma, granted to this affiant and Tom Halsell a franchise to construct and operate a toll bridge across the South Canadian at or near Purcell, Oklahoma, a copy of which franchise is attached to the bill of complaint filed herein as Exhibit A; on the 16th day of May, 1911, the Board of County Commissioners of Cleveland County, Oklahoma, granted to Tom Halsell and this affiant a franchise to construct, maintain and operate a toll bridge across the South Canadian River, a copy of which franchise is attached to the bill of complaint and marked Exhibit B. As the land adjoining the river on the West was low, and as the lines of the A. T. & S. F. Ry. Company ran North and South between the City of Purcell and the river, it was necessary and expedient to arrange for the West terminus of the bridge to be at a point West of the lines of the A. T. & S. F. Ry. Company, and on the high ground just West of such railroad. Hence on the 26th day of April, 1911, this affiant acquired from H. W. Archer and J. G. Archer, by warranty deed, the tract of land situated in the City of Purcell, McClain County, Oklahoma, described as follows:

Beginning at the Northwest corner of Block 93; thence East 49 feet along the North line of said block; thence South parallel with the West line of said block 182 feet; thence West 49 feet; thence North along the West line of said block a distance of 182 feet.

It then became necessary to acquire an easement over the

property lying between the block of land last above described and the East line of Block 93, as the contemplated bridge would extend over that land. Hence on May 27, 1911, Dorset Carter acquired by deed from Henry Braun, Trustee, an easement for the purpose of erecting a bridge thereon, and the right to do any and all acts necessary for the construction and maintenance of such bridge, to continue so long as such bridge shall be maintained, a strip of land situated on the North side of Block 93 in the City of Purcell, McClain County, described as follows:

Beginning at the Northeast corner of Block 93; thence West along the North line of said block a distance of 170 feet, thence South parallel with the West line of said block a distance of 20 feet; thence East and parallel with the North line of said block a distance of 170 feet; thence North along the East line of said block a distance of 20 feet to place of beginning.

That thereafter in order to provide an approach to said bridge, the said Dorset Carter acquired by warranty deed from H. W. Archer and J. G. Archer, on June 20, 1911, a tract of land in the City of Purcell, described as follows, to wit:

A tract of land situated in the City of Purcell, McClain County, State of Oklahoma, described as follows: Beginning at the Northwest corner of block 92; thence South along the West boundary line of said block a distance of 25 feet; thence East parallel with the North boundary line of said block a distance of 300 feet; thence North along the East boundary of said block a distance of 25 feet to the Northeast corner of said block; thence East along the North boundary of said block a distance of 300 feet to place of beginning.

Affiant further states that after obtaining the two franchises above mentioned, this affiant and the said Tom Halsell commenced arrangements for financing the building of the bridge; that prior to the time the franchises were obtained, Charles H. Hamill and Willoughby G. Walling had no connection with said franchises or the proposed construction and operation of the toll bridge, but after the franchises

were obtained, this affiant, while seeking to arrange for the financing of the construction of the bridge, succeeded in interesting the said Willoughby G. Walling and Charles H. Hamill in the project, and arranged for the said Willoughby G. Walling and Charles H. Hamill, who were at that time residents of the City of Chicago, in the State of Illinois, to furnish the money for the construction of the bridge, and as a part of the arrangement for the construction of said bridge, this affiant caused Purcell-Lexington Toll Bridge Company to be incorporated under the laws of the State of Oklahoma, under an agreement between Purcell-Lexington Toll Bridge Company and Dorset Carter, Tom Halsell, Willoughby G. Walling and Charles H. Hamill that they would deliver to Purcell-Lexington Toll Bridge Company a completed bridge, and assign, convey and transfer to said Purcell-Lexington Toll Bridge Company the franchises and parcels of land above described, in consideration of certain bonds and stock of Purcell-Lexington Toll Bridge Company.

This affiant further states that the said affiant, Willoughby G. Walling and Charles H. Hamill entered into a contract with Central States Bridge Company for the construction and erection of said bridge, and that the same was constructed and completed, and on December 6, 1911, Dorset Carter, Tom Halsell, Willoughby G. Walling and Charles H. Hamill executed a conveyance to Purcell-Lexington Toll Bridge Company, a copy of which is attached to the bill of complaint as Exhibit C, and the said Purcell-Lexington Toll Bridge Company thereby became the owner of the said toll bridge and the franchises to own, operate and maintain the same; that said conveyance was duly recorded in McClain County and Cleveland County.

Affiant further states that Purcell-Lexington Toll Bridge Company continued to own, operate and maintain said toll bridge and to collect tolls therefrom until April 2, 1931, on which date Purcell-Lexington Toll Bridge Company executed a conveyance to Willoughby G. Walling, Charles H. Hamill and Dorset Carter, conveying to them the real estate located in the City of Purcell owned by Purcell-Lexington Toll Bridge Company above described, and assigning, transfer-

ring and conveying the above described franchises, a copy of which conveyance is attached to the bill of complaint as Exhibit D.

On April 17, 1931, this affiant executed and delivered a deed to Willoughby G. Walling and Chares H. Hamill, conveying to the said Willoughby G. Walling and Charles H. Hamill all his right, title and interest in and to the property above described, and all of his right, title and interest in and to the franchises to operate a toll bridge across the South Canadian River and to collect tolls thereon, a copy of which deed is attached to the bill of complaint as Exhibit E. Affiant states that said transfer was made in good faith, for a valuable consideration and without any agreement or understanding on the part of Willoughby G. Walling and Charles H. Hamill, or either of them, to reconvey the property or any part thereof to this affiant, and said conveyance was made with the absolute purpose and intention to transfer all of the right and interest of this affiant to the said Willoughby G. Walling and Charles H. Hamill, and the said Willoughby G. Walling and Charles H. Hamill have at all times since that date been the absolute owners of said property, and this affiant has no right, title or interest in and to the same.

Affiant further states that at the time of the sale of this affiant's interest in said property to Willoughby G. Walling and Charles H. Hamill, this affiant was indebted to the First National Bank & Trust Company of Oklahoma City, Oklahoma, and said bank held the stock of this affiant in Purcell-Lexington Toll Bridge Company as collateral security; that the bank had made demand for the payment of the indebtedness, and this affiant arranged to sell Willoughby G. Walling and Charles H. Hamill his interest in the above described property for the purpose of obtaining the money to pay said indebtedness, and the consideration received by him was used for that purpose.

Affiant further states that Purcell-Lexington Toll Bridge is a structure having an East terminus on the public highway, and extending across the South Canadian River and across the tracks of the A., T. & S. F. Ry. Company, and

across a strip of land approximately 170 feet long and 20 feet wide to the West terminus, which is at or near the Northwest corner of Block 93 in the City of Purcell; that the strip of land above described across the North side of Block 92 in the City of Purcell has been used, and is still used, as an approach to said bridge, and the West end of said bridge is constructed above the land in Block 93 of the City of Purcell, which has been hereinabove described; that said bridge was constructed with a plank road extending from the East terminus across the river, the A. T. & S. F. Ry. tracks and the land in Block 93 above described, to the West terminus of said bridge, and a dirt road was maintained and is still maintained from such West terminus across Block 92 in the City of Purcell on the property above described for the purpose of the approach of wagons and other vehicles.

Affiant further states that Charles H. Hamill and Willoughby G. Walling are residents of the City of Chicago, State of Illinois, and have been residents of said State for more than twenty years."

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Complainants offered in evidence the following stipulation signed by the attorneys for the respective parties (omitting caption and signatures):

"It is hereby stipulated by and between the attorneys for the respective parties hereto that, for the purpose of the hearing on complainants' application for a temporary injunction, the facts alleged in the bill of complaint are admitted to be true.

It is further admitted that the conveyance attached to the bill of complaint as Exhibit C was recorded in the office of the Register of Deeds of Cleveland County, Oklahoma, on the 12th day of December, 1911, in Book 33 at page 626, and in the office of the Register of Deeds of McClain County, Oklahoma, on December 11, 1911, in Book 28 at page 153; that the deed attached to the bill of complaint as Exhibit D was recorded in the office of the County Clerk of Cleveland County, Oklahoma, on May 15, 1931, in Book 87, at page 388,

and was recorded in the office of the County Clerk of McClain County, Oklahoma, on May 16, 1931, in Book 97, at page 112; that the deed attached to the bill of complaint as Exhibit E was recorded in the office of the County Clerk of Cleveland County, Oklahoma, on May 15, 1931, in Book 87, at page 390, and in the office of the County Clerk of McClain County, Oklahoma, on May 16, 1931, in Book 97, page 113."

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Thereupon defendants filed motions to dismiss the bill of complaint and by agreement of counsel for the respective parties in open court notice of the hearing on the motion to dismiss was waived, and the court proceeded to hear said motion immediately.

After hearing argument of counsel, the court continued the hearing until May 29th, 1931.

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On May 29th, 1931, the attorneys for the defendants withdrew the stipulation which had been filed on May 25th, and which is set out above, and filed an instrument designated "Admission of Defendants of Facts only for the Purpose of Hearing the Application for Temporary Injunction," which is as follows (caption and signatures omitted):

"It is admitted by the defendants that all exhibits attached to the bill of complaint filed by plaintiffs in this action are true and correct copies of the originals and that the same have been filed with the proper officers as required by the laws of the State of Oklahoma.

"It is admitted that Sam Hawks, J. F. McKeal and Lew Wentz constitute the Highway Commission of Oklahoma, and that J. Berry King is the Attorney General of said State; that Purman Wilson is County Attorney of McClain County, Oklahoma, and that Person Woodall is County Attorney of Cleveland County, Oklahoma; that J. R. Evatt, A. O. Maddox and J. E. Colbert are County Commissioners of McClain County, Oklahoma, and residents of the Eastern District of Oklahoma; that the defendants J. C. Todd,

George Carpenter and George N. Church are County Commissioners of Cleveland County, and residents of the Western District of Oklahoma.

"The defendants admit that this is an action between citizens and residents of the State of Illinois as plaintiffs and certain citizens and residents of the State of Oklahoma as defendants, but that the individual members of the Highway Commission and the Attorney General have no personal interest in the subject matter of this litigation and only represent the sovereign State of Oklahoma, and contend that the State of Oklahoma is not a citizen within the meaning of the diverse citizenship statutes.

"Defendants admit that the plaintiffs herein and Dorset Carter caused to be incorporated under the laws of Oklahoma the Purcell-Lexington Toll Bridge Company which authorized the erection, construction, building and maintaining of the toll bridge involved herein.

"Defendants further admit that the conveyances described in the bill of complaint conveying real estate described therein were executed on the days referred to and that the same were filed with the proper*ty* County Clerk.

"The defendants admit that the Purcell-Lexington Toll Bridge Company constructed the toll bridge property involved in this action and operated the same until recently.

"Defendants admit that the corporate life of the Purcell-Lexington Toll Bridge Company expired on May 18, 1931, and further admit that the Purcell-Lexington Toll Bridge Company executed the instrument marked Exhibit B to the petition herein which attempted to convey the bridge property and other property involved to Willoughby G. Walling, Charles H. Hamill and Dorset Carter, and that Dorset Carter on the 17th day of April, 1931, attempted to assign his interest in said property to the plaintiffs herein.

"The defendants admit that so far as the records are concerned Willoughby G. Walling and Charles H. Hamill are the owners of the bridge property involved herein, but it is the contention of the defendants that the bridge company

was without authority of law to transfer any interest in said property and that in fact the same constituted a fraudulent transfer. The defendants do not admit that the plaintiffs have a legal right to operate said toll bridge and collect tolls therefrom.

"The defendants admit that they are contending that the right to operate said toll bridge and collect tolls from persons using the same terminated on May 18, 1931, and that the same is at this time a part of the State Highway system of the State of Oklahoma, with the right and privilege of citizens not only of Oklahoma, but citizens of any country, using the highways of Oklahoma, to use the same as a public highway without the payment of tolls.

"The defendants admit that the individual members of the highway commission and the Attorney General as executive officers of the State intended to and will unless enjoined by this court, bring suit to prohibit the collection of tolls for the use of said bridge and to abate the same as a public nuisance.

"The defendants deny, however, that they have intended to bring suit to enforce the provisions of Sections 5372, 5373 and 5375, Compiled Oklahoma Statutes 1921, or any other statute involving punishment for crime or providing for a forfeiture."

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Thereupon on request of attorneys for the defendants, they were permitted to introduce certain testimony as follows:

Dorset Carter, called as a witness for the defendants, testified as follows:

I am acquainted with the matters involved in this law suit. I am an attorney-at-law, and I was one of the persons who negotiated the movement to build the Purcell-Lexington toll bridge. I am familiar with the exhibits attached to the bill of complaint as Exhibits A and B, being secondary franchises received from the County Commissioners of McClain and

Cleveland Counties, Oklahoma. I appeared before the County Commissioners when those franchises were issued. I don't have any independent recollection as to whether I filed a written application for the issuance of those franchises with each of the Boards of County Commissioners, as that was over twenty years ago. I have not looked in my files or the files of the Purcell-Lexington Toll Bridge Company for copies of such applications. I have never thought of them since the day it happened. If I have them I will be glad to give them to you.

In answer to the interrogation by the court:

> "Did you have in mind the forming of a corporation when you entered this bridge proposition?"

the witness testified:

> "I can't say that we had. That was a long time ago, and I have built a good many things in this State—railroads, pipe lines and different things—and I know I never did take steps, or any definite way of doing anything until I got to the point where I wanted to act, because the other fellow might want it a little different than I would fix it; experience has taught me to do it that way, and I am satisfied I did not feel I had anything in mind; that when we got the money that we had to make the thing work out in whatever way I was required to do it."

The assignment to the bridge corporation was made about the time the bridge was finished.

On further direct examination the witness testified:

I do not know whether the applications to the County Commissioners of McClain and Cleveland Counties were oral or written, I cannot remember that. I was acting as my own attorney in the preliminary organization, or the things that I did down there. I think I prepared the former, which is pleaded in the bill; I didn't have any lawyer, I know that. The franchises will disclose the words used therein, and are better evidence than anything I could testify to as the words

used in the franchises. Purcell-Lexington Toll Bridge Company had negotiations on a good many times for the sale of the bridge proper, and had it sold once, before the Supreme Court of Oklahoma decided the case of Lexington-Purcell Toll Bridge Company vs. Leeper, Secretary of State, which was a mandamus proceeding, but no sale was consummated until April, 1931.

In answer to a question by the court, the witness testified:

Purcell-Lexington Bridge Corporation operated itself all the time up until the recent assignment this year. As to how much the bridge has paid above expenses of operation, the best information I have is the Corporation Commission's report. Every rate that was ever charged on the bridge has been fixed by the Corporation Commission, and there have been three rate cases tried out there in which the Corporation Commission sets out the earnings each year and the net earnings. The last annual report would show about $42,000.00 net. It is my recollection, but the figures are available even though the corporation has gone out of existence. I think the first three years the operation of the toll bridge would not pay the expenses, taking into consideration the damages that occurred and the depreciation, and we had to put up money to pay the taxes. All of those facts are a matter of record in the office of the Corporation Commission.

Statements were furnished to the Corporation Commission covering total revenues and operating expenses, 1923 to 1929. Such reports show all taxes and expenses paid, including privilege tax to the United States government and expenses.

At that point the court inquired of the Attorney General if he had the records of the Corporation Commission, and he advised that they had been sent for. The attorney for the complainants thereupon stated to the court that on a hearing for temporary injunction, the court does not have to determine the matter to the same extent as in a trial on the merits, and that if the attorneys for the defendants would permit him to go into the matter of earnings, it would

be necessary for complainants to obtain records showing reconstruction of the bridge in the past, and that the bridge had been rebuilt several times. The court stated the reason he wanted the niformation was that the matter of the financial standing of the Bridge Company has some bearings on the legal question.

On further direct examination, by counsel for the defendants, the witness stated:

I don't recall whether at the time the corporation was formed or about that time, or previous thereto, I obtained permission from the County Commissioners of McClain County and Cleveland County to built a wagon road as provided by Section 3627 of the statute. I had more trouble in financing the bridge than anything else. I knew I could get a franchise probably long before I got it. I made arrangements with some 15 or 20 people to furnish money for the bridge. They would take the plans to an engineer and he would condemn it. That was done 15 or 20 times in the course of about four years. Finally I conceived the idea that Lloyd's Insurance Company would insure anything, and I went to their offices in New York and they agreed to submit the proposition to their engineer, which was done, and they agreed to carry the insurance. I had not then decided who I would go after to finance it, but I knew that with the insurance it would be a whole lot better than an engineer's opinion, and the matter of forming a corporation, etc., I don't know just what occurred.

The court asked: "As I understand it, you formed a corporation."

The witness answered: "No, I was getting it financed before I formed a corporation, and I knew with that insurance policy I could finance it any way I wanted to."

The court asked: "Well, I thought you said they would want a corporation?"

The witness answered: "Anybody would want a corporation, no one would put money into anything like that indi-

vidually, and that I wanted a corporate right, but I didn't want to go and take one that would be wrong."

On further direct examination the witness stated:

As to whether the proceeding under the statute provided for building a wagon road by an individual or by a corporation, or whether I proceeded under the bridge statute, would be a legal conclusion, and I would not attempt to answer that. The contract price for the bridge was $59,000.00, but the contractor lost over $100,000 on the job. The last valuation put on the bridge by the Corporation Commission was $174,000. Mr. Hamill and Mr. Walling were the officers of the corporation and made out the reports filed with the Corporation Commission and sent them to me and I filed them.

On cross examination the witness testified as follows:

After the construction of the bridge there was considerable reconstruction between that date and the present time; after the bridge was completed and accepted and put into operation the approach on the east end was washed out, and we built another span of 150 feet of steel, and another approach on the end was constructed. Then we had an old floor that caused a lot of trouble and it ran up a good many thousand dollars every year. Boardman & Company of Oklahoma City built a new floor complete, took out the stringers and put in new I-beams and creosoted cross-ties and built a complete bridge floor and put in steel and concrete foundations at cost of $60,000.00. Those items were in addition to the regular maintenance and repairs.

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Thereupon a copy of the Articles of Incorporation of the Purcell-Lexington Toll Bridge Company was introduced in evidence and is as follows:

Articles of Incorporation.

Be It Known, that the undersigned citizens of the State of Oklahoma do hereby voluntarily associate ourselves together for the purpose of forming a corporation under the laws of the State of Oklahoma, and do hereby certify:

First: That the name of this corporation shall be Purcell-Lexington Toll Bridge Company.

Second: That the purposes for which this corporation is formed are to erect, construct, build and maintain, or to lease or purchase and operate a toll bridge, and the approaches thereto, over and across the South Canadian River, at or near the City of Purcell, McClain County, Oklahoma, to the east banks of said river in Cleveland County, State of Oklahoma, for the passage of footmen, passengers, cattle and vehicles of all kinds, and of wires for the transmission of electric currents for speech, light or power, and for pipes and mains for water and gas; and to collect and receive tolls for such service; and to lease or to sell such rights over said bridge and the approaches thereto.

Third: That the banks on the west side of said South Canadian River, at or near Purcell, McClain County, State of Oklahoma, on which said bridge is to be constructed, is owned by said corporation, and that on the east side of said river, to wit: Cleveland County, Oklahoma, it is the purpose of said corporation to construct said bridge so as the same will have landing in a public highway situated on the section line between sections six (6) and seven (7), township six (6) north, range one (1) west, and that said corporation has obtained in writing the consent of the Board of County Commissioners of Cleveland County for the erection of such bridge.

Fourth: That the placse where its principal business is to be transacted are Purcell, Oklahoma, and Lexington, Oklahoma.

Fifth: That the terms for which the corporation is to exist is twenty (20) years.

Sixth: The number of directors or trustees of this corporation and the names and residences of such of them who are to serve until the election of such officers and their qualifications, are as follows:

G. H. Parker, Purcell, Okla.;
J. T. Stathem, Purcell, Okla.;
R. C. Boles, Purcell, Okla.

Seventh: That the amount of capital stock of this corporation shall be $100,000.00, and shall be divided into 100 shares of $100.00 each.

In witness whereof, we have hereunto subscribed our names this 17th day of May, A. D. 1911.

This certificate is issued subject to the following constitutional requirement: That the corporation to which it is issued will submit any difference it may have with employees, with reference to labor, to arbitration, as shall be provided by law.

G. H. Parker,
J. T. Stathem,
R. C. Boles.

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State of Oklahoma, McClain County.

Personally appeared before me, a Notary Public in and for said county, State above named, G. H. Parker, J. T. Stathem, and R. C. Boles, who are personally known to me to be the same persons who executed the foregoing instrument of writing, and duly acknowledged the execution of the same.

In testimony whereof, I have hereunto subscribed my name and affix my notarial seal this 17th day of May, 1911. A. S. Welch, Notary Public. My commission expires June 15th, 1913 (Seal).

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No. 8467. Articles of Incorporation of the Purcell-Lexington Toll Bridge Company, Purcell, Oklahoma.

Secretary's Memorandum. Oklahoma City, State of Oklahoma, Secretary's Office.

This instrument was filed for record this 18 day of May, A. D. 1911, at 9 o'clock a. m.

Recorded in Corporation Record No. 31, at page 496.

Received 5-18-11. From Dorset Carter, Purcell, Okla.

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Purman Wilson, called as a witness for the defendants, testified as follows:

I am one of the defendants in this case, and I am County Attorney of McClain County. I have searched the records in the office of the County Clerk of McClain County recently, and I could not find that there had ever been filed a written application by Mr. Carter or Mr. Halsell making application to the County Commissioners for a permit to build either a wagon road or a toll bridge. I made a thorough search.

On cross examination the witness stated:

"We did not find any of the old files of the County Commissioners back in 1911. We found in the Commissioners' proceedings in the journal where a franchise had been given. We not only failed to find any franchise papers filed, but failed to find any other papers that were presented during that period."

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Person Woodall was called as a witness for the defendants, and it was admitted that he would testify to the same facts concerning Cleveland County as testified to by Mr. Wilson with reference to the records of McClain County, Oklahoma.

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Copies of reports made by the Bridge Company to the Corporation Commission for the years 1923 to 1928, inclusive, were introduced in evidence and showed a net revenue of the following amounts:

| Year | Amount |
|---|---|
| 1923 | $15,507.42 |
| 1924 | 14,626.84 |
| 1925 | 29,914.64 |
| 1926 | 36,266.70 |
| 1927 | 61,857.30 |
| 1928 | 69,083.48 |

Thereupon the court asked what the net revenue of the

bridge company was according to the reports shown, and it was suggested that the same would be set down in chronological order, and it now appears as hereinabove set forth.

The court permitted the introduction of the copies after the same were certified to by the officers of the Corporation Commission, and the same are attached to the transcript of the testimony as Exhibit A.

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Thereupon the following proceedings were had:

"The Court: They may be introduced with the understanding that you will authenticate them by proper certificate, subject to any corrections or errors.

Mr. Cochran: Of course, I am objecting to them on the ground that they are incompetent, irrelevant and immaterial; when the Corporation Commission has fixed the rates, those are the rates we have to charge, whether they are remunerative or not.

The Court: I assume his theory is to show what they made.

Mr. Cochran: Of course, our contention is that where a concern has a franchise, the fact that it may have received too much or too little revenue during any year or years does not deprive it of its right to continue to operate under the franchise.

The Court: Well, just read me what the net revenue is shown to be there. This will all be subject to correction if there is any error.

Mr. Lewis: I will get it in chronological order. Beginning with the year 1923, the net profit for that year was $15,431.58.

The Court: Well, I will let you introduce those, subject to correction, and you may tabulate them and show the total. What I want to know is the total. You can give me that later.

(The statements so identified and offered were thereupon

received in evidence as defendants' Exhibit No. 2, and full, true and correct copies of the same are attached to the transcript of testimony.)

The Court: Is there anything else you want to offer?

Mr. Lewis: That is all.

The Court: Do you want to introduce any further testimony, Judge Cochran?

Mr. Cochran: No.

The Court: I don't assume you care to argue the matter further. I have read your briefs.

It is my view of the law, gentlemen, that under sections 5366 to 5375, inclusive, of article 6, chapter 34, known as the bridge corporation act, the state was authorized to charter a bridge corporation for a period of 20 years, and I am of the opinion that that is the statute under which Mr. Carter and his associates attempted to proceed in 1911, when they contemplated the building and construction and operation of the bridge in controversy; that it was contemplated at the time Mr. Carter was obtaining a permit or franchise or whatever you want to term it, from the county commissioners of McClain and Cleveland Counties, that he would form a corporation and proceed with the construction and building and operation of this toll bridge. I think, as he testified, when he applied for insurance it was believed at that time that in order to construct and build and operate a toll bridge it was necessary to comply with these statutes found in chapter 34, article 6.

A corporation was formed, and all of the rights that Mr. Carter and his associates had obtained from the two counties were held by them as trustees for this bridge corporation to be formed, and it was formed and they assigned their franchise or permit from the two counties to the bridge company to operate this toll bridge.

I am of the opinion that there is no authority whatever in the statutes of Oklahoma to grant a perpetual franchise to individuals under this charter and article to build, construct

and operate a toll bridge; that when the charter of the corporation expired, the bridge and the road leading up to the abutments having been dedicated to the public use, reverted to the state, disencumbered of any right to collect tolls.

Now, section 10,104 of the Oklahoma statutes provides:

> "When any person or any bridge company incorporated under the laws of this state desires to bridge any such stream which shall be the boundary of this state at a point not nearer than 10 miles to any other bridge across such stream, they shall have the power to do so and collect a toll to be determined by the county commissioners of the county within which such bridge shall in part be situated."

That section has no application to the situation here, because it is not claimed that this bridge is a bridge on the boundary of the state.

Now, the only other statute I have been able to find is that relating to wagon road corporations, found in chapter 34, article 18, sections 5625 to 5636, inclusive. Section 5625 authorizes the formation of a wagon road corporation, and it provides:

> "Where a corporation is formed for the construction and maintenance of a wagon road, the road must be laid out as follows:"

It then gives a description of the road to be built.

Section 5626 provides the manner of making and mapping and surveying the route of such a road.

Section 5627 provides for the building of bridges and ferries on toll roads, as follows:

> "All wagon road corporations may bridge or keep ferries on streams on the line of their road, and must do all things necessary to keep the same in repair."

It would seem it was contemplated by these sections that a corporation that had been formed for the purpose of building a toll road, in order to keep the continuity of the road,

might ferry a stream or bridge a stream; that is, a road corporation.

Now, section 5636 provides:

> "When a wagon, turnpike or plank road is constructed, owned or operated by any natural person, this article is applicable to such person in like manner as it is applicable to corporations."

I have carefully gone over all of the provisions of this article, and I am unable to find that there would be any authority in the board of county commissioners of any county to make a grant of a perpetual franchise to a person to build a toll bridge under this article and the statutes unless it was contemplated it was for a connecting link to ferry or bridge a stream in order to conduct a toll road business.

Mr. Cochran: What is Your Honor going to do with the decision of the Supreme Court of Oklahoma in the Postal Bridge case construing that?

The Court: I was going to come to that. I will admit there is some language in the statute lending some color to that construction, but here is my view about the Post Bridge case as against the DeLuxe Bridge case, that seems to be the Oklahoma bridge involved at Bridgeport: As I see the facts—and I read the case again this morning—the DeLuxe Bridge Company was incorporated under the bridge laws of Oklahoma.

Mr. Cochran: It did not comply with the bridge law of Oklahoma.

The Court: Well, they said that question was immaterial in that case; it did attempt to comply. I will admit that if that direct point were involved here, the opinion would be binding upon the Federal court.

Mr. Cochran: Well, the direct point is involved in this case.

(After argument of counsel, the proceedings were continued as follows:)

The Court: The conclusion I have reached is that it would require plain and definite statutory authority for the board of county commissioners to issue even a limited franchise to take toll over any stream of the state. They can exercise no power that the statute has not authorized, and I have been unable to find any such statutory power or a statute granting any such power.

It is my conclusion that the plaintiffs are not entitled to a temporary injunction.

Of course, I reach the conclusion that the bridge disencumbered from any right to collect tolls; that the purpose of granting a franchise to collect tolls is simply to give the party a right to reimburse himself for the construction of the bridge. When he has had that franchise which the statute authorizes for that length of time, then the bridge goes back to the state disencumbered of any right to collect tolls. The consideration of that is the granting of that privilege to take a toll off of the public.

Now, I want to stay the execution of this order for a reasonable time.

Mr. Lewis: I would like to have time to file an application for a receiver.

The Court: I don't see any necessity for a receiver. All you need is somebody to collect the tolls and turn them in where they can be kept impounded. Let us do not burden the thing with the expense of a receivership.

(After further argument of counsel, the proceedings were continued as follows:)

Mr. Cochran: We have reached an agreement with reference to the handling of the funds. I wanted to inquire about when Your Honor would be back here.

The Court: Well, I can hardly tell about that.

Mr. Cochran: Well, it is possible, since we have reached an agreement in regard to the handling of the funds, that

we can draw up the papers and mail them to you at Tulsa and they can be signed over there.

The Court: I wish you would.

Mr. Cochran: Now, if I understand the way the matter is to be handled, there will be an order entered sustaining the motion to dismiss the bill of complaint on the ground that the facts stated do not entitle the plaintiffs to relief in equity, or in substance that.

The Court: Yes.

Mr. Cochran: Exceptions allowed and possibly the order will state that inasmuch as the bill of complaint is dismissed, the application for a temporary injunction is denied?

The Court: That is right.

Mr. Cochran: Then we prepare our application for allowance of an appeal from the order dismissing the bill of complaint and present that to Your Honor and that is allowed, and at the same time we apply for an injunction pending the appeal in order to protect the rights of the parties?

The Court: That is right.

Mr. Cochran: And Your Honor will make an order allowing the appeal, staying the judgment and fixing a rather nominal appeal bond, and reciting that the parties have agreed in open court that the matter will be handled pending the disposition of the case on appeal in the following way, and will recite it, and make an order that the funds be impounded?

The Court: Yes.

Mr. Cochran: Now, the agreement is that we name one commissioner from each county, and Mr. Carter, and they will issue a new form of receipt which the Attorney General will prepare and deposit the funds in the First National Bank & Trust Company of Oklahoma City, as trustee, and the order will further provide that they will pay out of the funds collected the salaries of 4 toll collectors and $25 a month on stenographer's salary to make these reports, and

will pay the necessary expenses of keeping the bridge in repair

The Court: Yes, I think that is correct.

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It is hereby stipulated that the above and foregoing narrative statement of evidence, and all the proceedings in connection with the introduction of such evidence, is true and correct and may be approved by the Judge without notice.

Dated this 28th day of October, 1931.

Charles B. Cochran,
Attorney for Plaintiffs.

J. Berry King,
Attorney General,

and W. C. Lewis,
Attorneys for Defendants.

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The foregoing is in all respects hereby approved and settled as a true and complete statement of the evidence and the proceedings in connection with the introduction of such evidence in the above entitled cause.

Dated this 29th day of October, 1931.

F. E. Kennamer, District Judge.

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Endorsed: Filed in District Court on October 29, 1931.

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Exhibit B.

Notice.

To Charles H. Hamill and Willoughby G. Walling, Plaintiffs, and C. B. Cochran, Attorney of Record for said Plaintiffs:

You are hereby notified that the defendants will present

the original of the attached carbon copy of application for order approving transcript of testimony and order directing the filing of the same with the clerk of the United States District Court for the Western District of Oklahoma, and further ordering the clerk to transmit the same as part of the original files to the clerk of the United States Circuit Court of Appeals of the Tenth *District* of the United States at Denver, Colorado, for consideration by the court when said appeal is presented; and that said application will be presented to the Honorable F. E. Kennamer, assigned Judge, who tried the case, and the same will be so presented to said Judge in the Federal Court Room at Tulsa, Oklahoma, on the 11th day of September, 1931, at the hour of 10 o'clock a. m., or as soon thereafter as the court may hear the same, and all of whcih you will take due notice.

Dated this the 29th day of August, 1931.

W. C. Lewis,
Assistant Attorney General,

Attorney for Defendants.

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Acknowledgment of Service.

I hereby acknowledge service of the within and foregoing Notice and receipt of the copy of the Application referred to in said Notice, this the 29th day of August, 1931.

Charles B. Cochran,
Attorney for Plaintiffs.

Endorsed: Filed in District Court on Sept. 11, 1931.

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Order.

This cause coming on for hearing before the undersigned Judge before whom this case was tried in the United States District Court for the Western District of Oklahoma upon the application of the defendants for an order approving the transcript of the testimony introduced at the trial of

said cause and directing the filing thereof with the clerk of the United States District Court for the Western District of Oklahoma, and ordering the clerk to transmit the same as a part of the original records to the clerk of the Circuit Court of Appeals for the Tenth *District* of the United States; and defendants appearing by their attorney, W. C. Lewis, Assistant Attorney General of the State of Oklahoma, and the plaintiffs appearing by their attorney, C. B. Cochran, and it appearing to the court that after due consideration of such Application, same should be granted;

It Is Therefore Ordered, Adjudged and Decreed by the court that the transcript of the testimony submitted, as Exhibit A to defendants' application be, and the same is, hereby approved as a full, true, and correct transcript of the testimony introduced by the defendants in support of their motion to dismiss the plaintiffs' bill, and in opposition to plaintiffs' application for temporary injunction; and

It Is Further Ordered that said transcript be filed by the clerk of the District Court of the United States for the Western District of Oklahoma, and that after the same is filed said clerk be, and he is hereby, direced to transmit the same to the clerk of the Circuit Court of the Tenth Circuit of the United States at Denver, Colorado, as a part of the original records in said case.

To all of which the plaintiffs excepted and their exceptions were by the court allowed.

Dated this the 11th day of September, 1931.

F. E. Kennamer,
United States District Judge.

Endorsed: Filed September 11, 1931. Theodore M. Filson, Clerk. By Glenn H. Grubb, Deputy.

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(Clerks Certificate.)

United States of America, Western District of Oklahoma, ss.

I, Theodore M. Filson, Clerk of the District Court of the

United States for the Western District of Oklahoma, do hereby certify the within and foregoing to be a full, true and complete transcript of the additional portions of record, in case No. 1224, Equity, Charles H. Hamill et al., Plaintiffs, vs. Sam Hawks et al., Defendants, as full true and complete, as called for by the Order of the United States Circuit Court of Appeals for the Tenth Circuit, dated October 17th, 1931.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at office in the City of Oklahoma City, in said District, this 30th day of October, A. D. 1931.

(Seal)

Theodore M. Filson, Clerk.
By Grace G. Butler, Deputy.

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Filed Nov. 2, 1931. Albert Trego, Clerk.

# (OPINION.)

## United States Circuit Court of Appeals
### TENTH CIRCUIT.

No. 511—April Term, 1932.

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| Charles H. Hamill, et al., Appellants, vs. S m Hawks, et al., Appellees. | Appeal from the District Court of the United States for the Western District of Oklahoma. |

[April 14, 1932.]

Mr. Charles B. Cochran (Messrs. Ames, Cochran, Ames & Monnet were with him on the brief), for appellants.

Mr. W. C. Lewis, Assistant Attorney General, and Mr. Purman Wilson, County Attorney of McClain County (Mr. J. Berry King, Attorney General, and Mr. Person Woodall, County Attorney of McClain County, were with them on the brief), for appellees.

Before Lewis, Cotteral, and Phillips, Circuit Judges. Lewis, Circuit Judge, delivered the opinion of the court.

Appellants, citizens and residents of Illinois, brought this suit to obtain protection by writ of injunction of its claimed ownership of a bridge across the South Canadian River at Purcell, Oklahoma, and its alleged right to charge and collect tolls from the public for its use. The river is the dividing line between McClain and Cleveland Counties. The bridge was constructed as a toll bridge under franchises

from those counties and was operated as a toll bridge. The issues raised by motions to dismiss is one of law,—whether the franchises had expired when the order of dismissal was entered on May 29, 1931, from which this appeal was taken.

The two franchises, exhibited with the bill, were issued to Dorset Carter and Tom Halsell. The one from McClain County on April 22, 1911, and from Cleveland County on May 16, 1911. Each granted to Carter and Halsell and their assigns the right to construct, maintain, and operate the bridge as a toll bridge and collect tolls thereon. They prescribed the same schedule of tolls to be charged, followed by this paragraph:

> "The tolls above enumerated shall not be increased by the Bridge Company except as is now, or may hereafter be legally provided, but may be reduced by said Bridge Company upon the posting by them of proper notices as is provided by law."

Each of the franchises also contained this:

> "That the grants herein made shall be perpetual, subject only to such limitations as is by law now or may hereafter be provided."

They further stated that the grantees might transfer all their rights and privileges to any individual or corporation organized under the laws of the State of Oklahoma, and that their assigns should collect the tolls.

On May 18, 1911, Dorset Carter, appellant Walling, and one Hamill caused the Purcel-Lexington Toll Bridge Company to be incorporated as an Oklahoma corporation, and the franchises that had been granted to Carter and Halsell by the two counties were transferred to the corporation. It completed the bridge, maintained and operated it, and received tolls until April 2, 1931, when it conveyed by deed whatever rights it had in the bridge and franchises to Walling, Hamill, and Carter. Carter later conveyed his interest to Hamill and Walling. This bill was filed on May 15, 1931, three days before the corporate life of the bridge company

expired. It names as defendants the three members of the State Highway Commission, the Attorney General of Oklahoma, the county attorneys of the two counties and six individuals, three of whom reside in McClain County and three in Cleveland County. The bill of complaint alleged:

> "That the defendants, and each of them, are contending that the right to operate said toll bridge and to collect tolls from persons using the same will terminate with the corporate existence of the Purcell-Lexington Toll Bridge Company on the 18th day of May, 1931, and that said bridge will at that time become a free bridge and a part of the State Highway System of the State of Oklahoma, with the right and privilege of the citizens of the State of Oklahoma to use the same as a public highway without the payment of tolls."

It is further alleged that the franchises to operate the bridge as a toll bridge and collect tolls thereon were granted to individuals and not to the corporation; that they continue in full force and effect in accordance with their terms; that the right to continue in possession and operation of the bridge and take tolls is now in the plaintiffs; that the three members of the state highway commission will, unless restrained by the court, take charge of said bridge as a part of the highway system of the State in violation of plaintiffs' rights under said franchises and thus deprive plaintiffs of their property for the use and benefit of the traveling public without compensation, and thus deprive them of the right to continue in possession of said bridge and the collection of tolls from persons using the same; that the Attorney General of the State has threatened to institute proceedings against complainants to deprive them of their claimed rights, and contends that if complainants collect tolls after May 18, 1931, they will be subject to a forfeiture of $25.00 to each person from whom toll is collected and will further be guilty of obstructing the public highway and thus be subject to a fine not exceeding $100.00 for each offense; that the county attorney of each of said counties threatened like proceedings against complainants; that citizens of the state who use and who will continue to use said bridge are so numerous

that it is impossible to make all of them parties, and the six individual defendants are named as defendants as fairly representative of the entire class of citizens who travel over and across said bridge; that because of these threatened prosecutions, both civil and criminal, the invasion of plaintiffs' rights and the taking of their property without right and without compensation, they have no adequate remedy at law; that they will be subjected to a multiplicity of suits by the defendants, and by other citizens of the State who will desire to use said bridge, and because thereof they ask that the writ of injunction may issue and their claimed rights adjudicated.

The two county attorneys and the individual defendants moved to dismiss on the ground that the bill did not state facts sufficient to entitle the plaintiff to relief. The attorney general and members of the State Highway Commission moved to dismiss on the same ground and also on the additional ground that the suit was one against the State.

Obviously, the suit is not in terms against the State, and whether the joining of the attorney general and the members of the state highway commission as defendants has the effect of making it a suit against the State insofar as they are parties depends upon an examination of the bill on its merits, which apparently charges that those officers are threatening to commit acts without right or in excess of their powers. If so construed, when controlling principles of law are applied to the allegations of the bill, the suit would not be one against the State. *Reagan* v. *Farmers L. & T. Co.*, 154 U. S. 362, 390: *Old Colony Trust Co.* v. *City of Seattle*, 271 U. S. 426, 431; *Poindexter* v. *Greenhow*, 114 U. S. 270, 285; *Weiland* v. *Pioneer Irr. Co.*, 238 Fed. 519; *M., K. & T. Ry. Co.* v. *Warehouse Commissioners*, 183 U. S. 53, 59; *Magruder* v. *Belle Fourche Valley Water Users Assn.*, 219 Fed. 72, 78; *Ex parte Young*, 209 U. S. 123. We turn then to the other ground of the demurrer.

The bill of complaint alleged that the Purcell-Lexington Toll Bridge Company was organized on May 18, 1911, for the purpose of erecting, constructing, and maintaining, or to

lease or purchase and operate the toll bridge and approaches thereto over and across the South Canadian River at or near the City of Purcell, McClain County, Oklahoma, to the east bank of said river in Cleveland County, said State, for the passage of footmen, passengers, cattle, and vehicles of all kinds, and all wires for the transmission of electric currents for speech, light or power, and for pipes and mains for water and gas, and to collect and receive tolls for such service, and to lease or sell such rights over said bridge and the approaches thereto; that said articles of incorporation provide: "That the term for which the corporation is to exist is twenty years."

Article VI of Chapter 34, Compiled Oklahoma Statutes 1921, is entitled "Bridge Corporations." The first section under that article, numbered 5366 of the compilation, reads thus:

> "The term of existence of a bridge corporation shall not exceed twenty years; and in addition to the matters required by Section 5304 (of said statutes) every corporation formed for the purpose of constructing a bridge over any stream of water must, in the articles of incorporation, specify as follows: The place where such bridge is to be built, over what stream; that the banks on both sides of the stream where such bridge is to be built are owned by such corporation, or that it has obtained in writing the consent of the owners of the banks, where the bridge is to be built, to build the bridge; or that the banks at such place are included within and part of a public highway, and in such case that the consent in writing of the board of county commissioners of the county or counties for the erection of such bridge by such corporation has been obtained, and it must file a certified copy of its articles of incorporation in the office of the register of deeds of the county or counties in which the bridge or any part thereof is situated or to be located: Provided, that nothing in this section shall be construed as regulating companies incorporated in the State of Oklahoma for the purpose of erecting and maintaining

bridges across boundary streams or streams between the State of Oklahoma and any other state or territory."

The following Section 5367 provides:

"No such corporation shall construct or take tolls on a bridge until authority is granted therefor by the board of county commissioners of the county or counties in which it is to be located."

The Article further provides for the posting of the rates of tolls, the collection thereof, and annual report by the bridge corporation to the boards of county commissioners showing cost of construction, appendages and appurtenances of the bridge, the amount of money expended thereon since construction for repairs and incidental expenses, the capital stock, how much paid in and how much actually expended on the bridge, the amount received for tolls during each year, the amount of dividends, the indebtedness of the corporation and for what incurred, the net amount of profits, and such other facts respecting the business of the corporation as the board of county commissioners may require. The corporation is also required to publish for four weeks in a newspaper published in the town or city nearest such bridge its annual report, and a penalty is provided for failure to do so. The statute gives authority to collect tolls from those who use the bridge and provides a penalty in favor of the corporation owning the bridge against those who forcibly or fraudulently cross over the bridge without paying the legal toll. It is further provided that the corporation shall not demand or receive toll whenever the bridge is not in good and safe condition for use.

The grants from each county to construct and maintain the bridge and collect tolls were in terms to be perpetual, and there was no law or constitutional provision in effect when they were made, or now, that prohibited or limited such grants as to duration, nor were there prohibitions against making such grants to individuals and their assigns. But it was argued that by necessary implication such grants could be made only to a bridge company organized as a cor-

poration under the laws of the State, and that the charter of such company being limited to an existence of twenty years without express power of renewal the franchise to maintain the bridge and take tolls expired with the corporate life of the Purcell-Lexinton Toll Bridge Company on May 18, 1931. It is further argued that references in the grants to the "Bridge Company" indicate clearly that the two individuals to whom the grants were made took the grants for the company to be formed which would have been a compliance with the terms of the statute, and that individuals according to the terms of the statute could not take such grants in their own interests. Conceding the last proposition to be sound, it does not stand in the way of the right of said bridge compay to convey, as it did on April 2, 1931, all of its rights to maintain the bridge and collect tolls to Walling, Hamill, and Carter during the existence of the franchises thereafter as long as they continued. It was so decided by the Supreme Court of Oklahoma in *Postal Bridge Company* v. *State ex rel. Dabney, Attorney General,* 282 Pac. 462. In *Central Pacific Railroad* v. *California,* 162 U. S. 91, 124, the Supreme Court said of franchises of this nature:

> "Generalized and divested of the special form which it assumes under a monarchial government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public

> ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise."

They are property rights of value and are entitled to protection against invasion or destruction as long as they exist according to their terms, when the granting power that gives them acts within authority conferred upon it. The Supreme Court of Oklahoma has not held that such franchises can be granted only to an Oklahoma corporation, nor that they cannot be made perpetual, nor that they are not assignable, nor that they do not continue beyond the life of the corporation to which they are first issued, if they have been issued for a longer term than the life of the corporation. It has been held (Postal Bridge Company case, *supra*) that they may be assigned to, exercised and enjoyed by individuals; and we believe the general rule of law, both state and national, to be that in the absence of such prohibitions they continue to exist as valid contracts in favor of assignees.

We find no reason for saying such franchises may not be issued in the first instance to individuals. The Oklahoma Supreme Court in the Postal Bridge Company case referred to the fact that such franchises could be held and enjoyed by individuals who had a franchise for a toll road where it became necessary on the line thereof to erect and maintain such bridges; also it is provided in Section 10104 of the state statutes that individuals can obtain such franchises to erect and maintain bridges and collect tolls where they bridge streams which are boundary lines of the State. It therefore seems to us in view of what has been said that the implication that these franchises could not be granted for more than twenty years does not arise and cannot be deduced from the terms of said Section 5366; but that the two counties had the power to grant these perpetual franchises, that they were assignable to the plaintiffs, and they are now vested property rights in them.

The power is educed from Section 5793, Compiled Oklahoma Statutes, which gives to county boards general authority to construct and repair bridges and to open and lay out highways and perform such other duties required by law, and from said Sections 5366 and 5367, *supra*. The Supreme Court of Michigan in *Grand Rapids Bridge Co.* v. *Prange*, 35 Mich. 400, held that a statute of that state, identical in substance to said 5367 of the Oklahoma Statutes, was alone sufficient to confer power on the board to fix the term of existence of a franchise to construct and maintain a toll bridge and collect tolls for its use, regardless of whether the term so fixed be coincident with the life of the grantee. The Grand Rapids Bridge Company sued Prange for tolls which he had refused to pay. The corporate life of the company had not expired, but its twenty year franchise had expired when the claimed tolls were incurred. Chief Justice Cooley speaking for the court in that case said:

> "The purpose of the organization was to build the bridge in question; but as the river at this point was a navigable stream, the assent of the supervisors of the county was essential before the bridge could be constructed.—Comp. L. 1871, Sec. 2649. The same board was also by law the competent authority to fix the tolls. The assent was given by resolution of the board dated January 17, 1852 (one year after the bridge company was organized), 'to erect, rebuild, repair and keep up and use for the sole use and profit of said company, a toll-bridge, * * * for the term of twenty years;' and the tolls were fixed at the same time. The bridge was duly constructed and tolls collected of passengers for the term of this permission, but after the twenty years had expired, the defendant refused any longer to pay tolls, and passed over the bridge repeatedly without doing so. The plaintiff, claiming the right to continue to exact tolls according to the established rates, has brought this suit."

The bridge company contended in that case that it was organized for the purpose of constructing the bridge with a life of thirty years and that its franchise to take tolls could not

be restricted to a shorter term. Chief Justice Cooley in response to that contention said:

"* * * and it cannot be doubted that the board might in advance have negotiated with the parties proposing to form a corporation, and required of them, as a condition of assent to the building of the bridge, that the corporate life should be limited to any number of years specified. There might be reasons in the growing business of the place and of the river which would seem to require such a limitation; and the authority conferred upon the local board to give or withhold assent would lose very much of its value if it were confined within unvarying limits. It is not unreasonable to suppose that consent might sometimes be withheld under such circumstances when otherwise it would not be.

"But if the supervisors could bargain for a limitation of time before the corporate organization, so they could afterwards. The plaintiff by the organization only acquired corporate powers; it gained nothing that was originally within the control of the supervisors. The board was bound by nothing that so far had been done. The members of the board may not in any manner have become aware of the steps to organize until application was made to them for permission to construct the bridge, and they were at liberty to act on such public considerations as were then presented, and with no more concession of privilege than they supposed the public interest to require. They might have consented for five years, leaving a future board at the end of that time to consent, or refuse to consent, according as the public good would appear to be consulted by the one course or by the other. On this part of the case there does not appear to us to be any serious question.

* * * * * * * * * *

"* * but there is a question of the continued existence of the franchise to take tolls. That franchise was distinct from the corporate franchise, and came into

existence by grant, not directly from the State, but from the local board. The estate of the corporation in it was expressly limited to twenty years; and when that period came to an end, the estate ceased also. * * *. in this case the franchise in dispute is one which only theoretically proceeds from the State. The board of supervisors confer it, * * *."

The width of streams, the extent and effects of flood waters, the cost of construction and maintenance of bridges, and the amount and character of probable use are all variable and material elements for the board's consideration in issuing the franchise. Here the two boards were in agreement that it should be perpetual.

These franchises being perpetual and assignable extended beyond the life or lives of the first takers, whether corporate or individual, according to the settled rules. And the legislature in conferring power on counties to issue them and the counties in executing that power acted in discharge of proprietary or business powers, as distinguished from their governmental powers, so that the relation between them and the party to whom the franchises were issued was contractual. *Illinois T. & S. Bank* v. *Arkansas City*, 76 Fed. 271; *Pikes Peak Power Co.* v. *Colorado Springs*, 105 Fed. 1; *City of Winona* v. *Botzet*, 169 Fed. 321; *Louisville* v. *Cumberland Tel. Co.*, 224 U. S. 661; *Detroit* v. *Detroit Citizens St. Ry. Co.*, 184 U. S. 368, 394, 395; *Owensboro* v. *Cumberland Tel. Co.*, 230 U. S. 58, 70, 71; *Boise Water Co.* v. *Boise City*, 230 U. S. 84; *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100; *Covington* v. *South Covington St. Ry. Co.*, 246 U. S. 413, 416; *No. Ohio Trac. Co.* v. *Ohio*, 245 U. S. 574; *Calder* v. *Michigan*, 218 U. S. 591, 600. The cases in the supreme court just cited state the rule that a corporation is capable of taking grants of franchises of a longer duration than its own corporate existence, and that where a franchise is issued to A and assigns without limit of duration it is perpetual. See, also, *City and County of Denver* v. *Denver Tramway Corp.*, 23 Fed. (2d) 287, 299, 300. In *State* v. *Des Moines City Ry. Co.*, 159 Iowa 259, 140 N. W. 437, 457, the supreme court of that state said:

> "If, however, the grant is to successors or assigns, it does not terminate with the life of the corporation to which it is granted, but may be for a term beyond the corporate life of the original grantee."

In *State ex rel.* v. *Laclede Gas-Light Co.*, — Mo. —, 14 S. W. 974, the court said:

> "The capacity of a corporation to take, and its power to convey property, real, personal, or mixed, differs in no essential particular from the capacity and power of natural persons in like circumstances (citations). To deny this proposition would be to deny to an individual the capacity to take title in fee, because life's narrow span would not admit of his perpetual enjoyment of the title thus taken. But this is not the only answer to this objection. The contract in question was entered into not only with the St. Louis Gas-Light Company, but with its 'successors and assign,' * * *."

In *State ex rel.* v. *Scott County Road Co.*, — Mo. —, 105 S. W. 752 (S. C., 215 U. S. 336), the same legislative act that incorporated the company for fifty years limited its right to take tolls to fifty years. In *People ex rel.* v. *Anderson, etc. Co.*, — Calif. —, 18 Pac. 308, the right to take tolls on a wagon road was limited to fifteen years, and the court necessarily held that it became a public road at the end of the period stated. In *Rockwith* v. *State Road Bridge Company*, — Mich. —, 108 N. W. 785, the court held that the bridge company's right to take tolls ceased on expiration of the corporate life of the company, because the grant was only to the company, and not to it, its successors and assigns. In *State* v. *Lawrence Bridge Co.*, 22 Kan. 308, the legislative act of the Territory of Kansas granted to B et al., or their assigns, the exclusive right or privilege of building and maintaining a bridge across the Kaw River for the period of twenty-one years. A corporation was organized by the grantees which took over and exercised the rights given in the franchise. It was held that the franchise rights to maintain the bridge as a toll bridge expired at the end of the twenty-one years. In *Virginia Canon Toll Road Co.* v.

*People,* 22 Colo. 429, it appears that a wagon road company was organized in December, 1865, under a statute that gave it corporate existence for twenty years. The wagon road company was organized for the purpose of constructing and operating a toll road. It did so until October, 1881, when it transferred all rights it had, if any, to the toll road company, and it then operated for a time the toll road which had been constructed by the wagon road company, whereupon its rights were challenged by quo warranto. Each company had a corporate existence of twenty years, and the toll road company contended that the property it had acquired from the wagon road company was valuable only in case it had the right to collect tolls, that it was organized to operate the toll road, and unless it could do so it would be deprived of its property without due process. It does not appear whether a time limit was fixed to the franchise to take tolls, nor whether those rights were made assignable. The court held that the toll road company acquired from the wagon road company only such rights as the latter had, and inasmuch as its rights had expired with its corporate life the toll road company had no rights thereafter. It was further held that inasmuch as the Colorado Constitution prohibited the granting of irrevocable franchises by the General Assembly, the prohibition could be evaded if assignments of such grants were permissible. This case does not, in our judgment, have application to the facts here in hand.

It has been suggested that Section 32 of Article II, entitled Bill of Rights, in the Oklahoma Constitution prohibits perpetual franchises, and that it was so intimated, if not decided in *City of Okmulgee* v. *Okmulgee Gas Company,* 140 Okla. 88, 282 Pac. 640, 651. Bouvier's Law Dictionary defines Bill of Rights:

> "A formal and public declaration of popular rights and liberties. The English Bill of Rights is a statute passed in 1689, affirming and asserting certain rights of the British people. In the United States, such bills have been incorporated with the constitutions of many of the states."

The subject is dealt with extensively in Blackstone's Com-

mentaries, Book 1, Chap. I, entitled "Of the Absolute Rights of Individuals." Said Section 32 in the Oklahoma Constitution reads:

> "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State."

We do not doubt that the word "perpetuities" in said section was not intended to mean or be equivalent to perpetual franchises, but was intended to limit the power to pass titles that would vest *in futuro*. It was so applied by the Supreme Court of Oklahoma in *McLaughlin v. Yingling*, 213 Pac. 552, and in *Re Street's Estate*, 280 Pac. 413. See 48 C. J. 929; Kent's Commentaries on American Law, Vol. 4, p. 267. We find only one constitutional provision in Oklahoma on franchises. It is Sec. 7, Article XVIII, entitled Municipal Corporations, and reads: "and no exclusive franchise shall ever be granted." Section 47 of Article IX does, however, provide, that the legislature may annul charters or franchises in such manner that no injustice shall be done to the incorporators. Also, Section 10076 of the state statutes authorizes the purchase or condemnation of the rights of persons or corporations in toll bridges. The franchises here under consideration are not exclusive. The threatened action of the state officials as charged in the bill of complaint are threats to commit unlawful acts against rights and property of the complainants, and would be outside their powers as such officials and unjustified under the rule announced in *Cline* v. *Frink Dairy Company*, 274 U. S. 445, and by this court in a recent opinion in *Boynton, Attorney General*, v. *Ellis*, — Fed. (2d) —. This suit is not against the State, as contended by said officers.

The decree of dismissal is reversed with direction to the court below to issue the injunction prayed for in the bill.

(Decree.)

Fourth Day, April Term, Thursday, April 14th, A. D. 1932.

Before Honorable Orie L. Phillips, Circuit Judge, Honorable George T. McDermott, Circuit Judge, and Honorable John C. Pollock, District Judge.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to said District Court with direction to issue the injunction prayed for in the bill; and that Charles H. Hamill and Willoughby G. Walling, appellants, have and recover of and from Sam Hawks, J. F. McKeal and Lew Wentz, constituting the State Highway Commission of Oklahoma; and J. Berry King, Attorney General of Oklahoma; Purman Wilson, County Attorney of McClain County, Oklahoma; Person Woodall, County Attorney of Cleveland County, Oklahoma; and J. R. Evatt A. O. Maddox, J. E. Colbert, J. C. Todd, George Carpenter and George N. Church, appellees, their costs herein.

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(Clerk's Certificate.)

United States Circuit Court of Appeals, Tenth Circuit.

I, Albert Trego, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Oklahoma, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit, and full, true and complete copies of all the pleadings, record entries and proceedings requested by the praecipe filed herein, including the opinion, (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States), had and filed in the United

States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals for the Tenth Circuit wherein Charles H. Hamill et al. were appellants and Sam Hawks et al. were appellees, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at office in the City of Denver, Colorado, this 3rd day of June, A. D. 1932.

ALBERT TREGO,
Clerk of the United States Circuit
Court of Appeals, Tenth Circuit.

(Seal, U. S. Circuit Court
of Appeals, Tenth Circuit)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2637)

FILE COPY

Office Supreme Court, U. S.
FILED
JUN 10 1932
CHARLES ELMORE CROPLEY
CLERK

In the

# Supreme Court of the United States

## OCTOBER TERM, 1932

SAM HAWKS, J. F. McKEEL and LEW WENTZ, constituting the State Highway Commission of Oklahoma; J. BERRY KING, Attorney General of Oklahoma; PURMAN WILSON, County Attorney of McClain County, Oklahoma; PERSON WOODALL, County Attorney of Cleveland County, Oklahoma; and J. R. EVATT, A. O. MADDOX, J. E. COLBERT, J. C. TODD, GEORGE CARPENTER and GEORGE N. CHURCH,

*Petitioners,*

vs.

CHARLES H. HAMILL and WILLOUGHBY G. WALLING,

*Respondents.*

No. 147

## PETITION FOR WRIT OF CERTIORARI.

J. BERRY KING,
Attorney General of Oklahoma,
W. C. LEWIS,
Assistant Attorney General of Oklahoma,

*Counsel for Petitioners.*

Francis & Holden, Brief Printers, 523-5 West Second St., Oklahoma City. Phone 2-6245

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In the

# Supreme Court of the United States

OCTOBER TERM, 1932

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SAM HAWKS, J. F. MCKEEL and LEW WENTZ, constituting the State Highway Commission of Oklahoma; J. BERRY KING, Attorney General of Oklahoma; PURMAN WILSON, County Attorney of McClain County, Oklahoma; PERSON WOODALL, County Attorney of Cleveland County, Oklahoma; and J. R. EVATT, A. O. MADDOX, J. E. COLBERT, J. C. TODD, GEORGE CARPENTER and GEORGE N. CHURCH,

*Petitioners,*

vs.

CHARLES H. HAMILL and WILLOUGHBY G WALLING,

*Respondents.*

No. _____

---

## PETITION FOR WRIT OF CERTIORARI.

---

*To the Honorable the Supreme Court of the United States:*

Your petitioners, Sam Hawks, J. F. McKeel and Lew Wentz, constituting the State Highway Commission of Oklahoma; J. Berry King, Attorney General of Oklahoma; Purman Wilson, County Attorney of McClain County, Okla-

homa; Person Woodall, County Attorney of Cleveland County, Oklahoma, and J. R. Evatt, A. O. Maddox, J. E. Colbert, J. C. Todd, George Carpenter and George N. Church, respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals of the Tenth Circuit of the United States to reverse an opinion and judgment of said United States Circuit Court of Appeals of the Tenth Circuit of the United States, heretofore rendered against your petitioners, and in support thereof respectfully represent and show:

## STATEMENT OF THE CASE.

The petitioners, Sam Hawks, J. F. McKeel and Lew Wentz, constitute the State Highway Commission, an executive department of the State of Oklahoma, and J. Berry King is the duly elected, qualified and acting Attorney General of the State of Oklahoma.

The petitioners J. R. Evatt, A. O. Maddox and J. E. Colbert are County Commissioners of McClain County, Oklahoma, and Purman Wilson is the County Attorney of McClain County, Oklahoma; and the petitioners J. C. Todd, George Carpenter and George N. Church are County Commissioners of Cleveland County, Oklahoma, and Person Woodall is the County Attorney of Cleveland County, Oklahoma. The respondents, Charles H. Hamill and Willoughby G. Walling, are residents of the State of Illinois and claim to be the owners of a certain bridge structure located over the

South Canadian River between the towns of Lexington, Cleveland County, Oklahoma, and Purcell, McClain County, Oklahoma.

The respondents filed their bill of complaint against the petitioners herein as defendants in the United States District Court for the Western District of Oklahoma, seeking an injunction against the petitioners herein, and all persons acting by, through or under them, and all citizens of the State of Oklahoma using the Purcell-Lexington toll bridge from interfering with the respondents in the operation of said toll bridge and in the collection of tolls from persons using the same, and from using said bridge without the payment of tolls. Said bill further alleged that the action was one between residents of the State of Illinois and citizens and residents of the State of Oklahoma, and that the amount in controversy exceeded, exclusive of interest and costs, the sum or value of $3,000.00; that on the 22nd day of April, 1911, the County Commissioners of McClain County, Oklahoma, granted to Dorset Carter and Tom Halsell, and their assigns, a franchise to construct, erect and maintain a toll bridge across the South Canadian River at or near Purcell, Oklahoma; that the franchise so granted was perpetual, subject only to such limitations as by law provided. A copy of such franchise was attached to the complaint.

The bill further alleged that on the 16th day of May, 1911, the Board of County Commissioners of Cleveland

County, Oklahoma, granted to Dorset Carter and Tom Halsell, and their assigns, a franchise to construct, maintain and operate a toll bridge and to collect tolls thereon across the South Canadian River, which franchise was perpetual, subject only to such limitations as provided by law, and a copy of said franchise was attached to the complaint.

The respondents in said bill alleged that pursuant to authority granted by said franchise, Dorset Carter and Tom Halsell commenced the construction of the toll bridge across the South Canadian River; that on the 11th day of May, 1911, Willoughby G. Walling, Charles H. Hamill and Dorset Carter caused to be incorporated under the laws of the State of Oklahoma a corporation under the name of Purcell-Lexington Toll Bridge Company, for the purpose of erecting, constructing, building and maintaining, or to lease or purchase and operate the toll bridge and approaches thereto over and across the South Canadian River, and to collect and receive tolls for such service; that the articles of incorporation provided that the term of its existence was twenty years; that thereafter on the 6th day of December, 1911, Dorset Carter, Tom Halsell, Willoughby G. Walling and Charles H. Hamill conveyed and transferred to Purcell-Lexington Toll Bridge Company a certain bridge then in process of construction across the South Canadian River, with its supports, approaches, lands and franchises and property and the right to operate and maintain the same, with tolls

to issue therefrom, together with the franchise granted to Dorset Carter and Tom Halsell by the County Commissioners of McClain and Cleveland Counties; that by virtue of said conveyance, Purcell-Lexington Toll Bridge Company became the owner of the property therein described and the franchise to operate the toll bridge and collect the toils therefrom.

It further alleged that said Bridge Company completed the construction of the toll bridge authorized and for many years and until recently, said corporation owned and operated the toll bridge and private road leading thereto, and had collected tolls from the operation of the same under the terms of the franchise granted by said counties to Carter and Halsell; that the corporate life of the Purcell-Lexington Toll Bridge Company would expire on May 18, 1931, and said corporation on said date would cease to exist; that on April 2, 1931, the Bridge Company conveyed to Walling, Hamill and Carter the toll bridge and the franchise to operate the same and collect tolls thereon, and on the 17th day of April, 1931, Carter conveyed said property and franchise to Walling and Hamill and that said last named persons were then the owners of said bridge and the right to maintain and operate the same and to collect tolls thereon, and that they were at that time operating said bridge and collecting tolls authorized by law, and under the terms of the franchise owned by them and under which they were operating said toll bridge; that they had the legal right to con-

tinue to operate said bridge and collect tolls therefrom until such franchise had been revoked or repealed as provided by law, and that such franchise had not been revoked or repealed and was still effective.

The bill further alleged that the petitioners contended that the right to operate the bridge and to collect tolls from persons using the same would terminate with the corporate existence of the Bridge Company on the 18th day of May, 1931, and that said bridge at that time would become a free bridge and a part of the state highway system of Oklahoma, with the right and privilege of the citizens of the State of Oklahoma to use the same as a public highway without payment of tolls. That the franchises to construct, operate and maintain the bridge and collect tolls therefrom were granted to individuals and were not connected with nor influenced by the corporate existence of the Toll Bridge Company, and that the secondary franchise under which respondents operated said bridge and collected tolls thereon, did not terminate with the corporate life of the Toll Bridge Company, and that such franchise continued in full force and effect in accordance with the provisions of the secondary franchise. That the petitioners constituting the Highway Commission of Oklahoma would, unless enjoined by the court in violation of the franchise rights of the respondents, take charge of the toll bridge as part of the highway system of Oklahoma, and deprive the respondents of their

property for the use and benefit of the traveling public without compensation, and would interfere with and prevent the respondents from operating the toll bridge and collecting tolls from persons using the same, and that the petitioners were then and would continue to encourage the citizens of Oklahoma in the belief that they had the right to use said bridge without the payment of tolls after May 18, 1931, and by reason thereof, it would be practically impossible for respondents to conduct their business and collect the tolls which they were entitled to receive under the franchises, and that the business of the respondents and their investment in said bridge would be destroyed. That the petitioners Evatt, Maddox, Colbert, Todd, Carpenter and Church, were citizens of Oklahoma, residing in the vicinity of the bridge and representatives of the citizens of the State of Oklahoma, who had occasion to and did use said bridge after May 18, 1931, and that the petitioners and other citizens of Oklahoma having occasion to use said bridge, would, unless enjoined, use the same without the payment of tolls and respondents would either be compelled to resort to force to prevent the unlawful use of the bridge or prosecute a multiplicity of suits for that purpose. That the petitioners contended that if the respondents should collect tolls from persons using said bridge after May 18, 1931, they would be subject to a forfeiture of $25.00 to each person from whom a toll was collected, and that they would also be guilty of obstructing the highway and subject to a

fine of not exceeding $100.00 for each offense, and would also be liable in damages to the individuals prevented from using said bridge. That the petitioner J. Berry King, as Attorney General of Oklahoma, had threatened to and would institute injunction proceedings, or other legal proceedings, against the respondents for the purpose of preventing them from operating said bridge and collecting tolls therefrom, unless enjoined. That the petitioners Purman Wilson, County Attorney of McClain County, Oklahoma, and Person Woodall, County Attorney of Cleveland County, Oklahoma, would, unless enjoined, institute proceedings to prevent respondents from operating said bridge and collecting tolls therefrom, and would institute other proceedings to punish the respondents for the alleged unlawful obstruction of a public highway. That the respondents would be subject to wrongful and unlawful interference with the business of operating said toll bridge by the petitioners and each of them, and subjected to a multiplicity of suits and legal proceedings and respondents would be unable to operate their business without serious and imminent danger to persons and property and without subjecting themselves to a multiplicity of suits and legal proceedings on the part of petitioners and other citizens of the State of Oklahoma desiring to use said toll bridge. That respondents had no adequate remedy at law and unless an injunction was granted, they would suffer irreparable injury and danger and would be deprived of their property for public use without compensation.

A temporary restraining order was granted on May 15, 1931, and a hearing on the application for temporary injunction was set for May 23, 1931. The respondents filed an amendment to the bill of complaint alleging that the conveyance executed by Carter, Halsell, Walling and Hamill to Purcell-Lexington Toll Bridge Company was duly recorded in the office of the Registrar of Deeds of Cleveland and McClain Counties, and that the deed from the Purcell-Lexington Toll Bridge Company to Walling, Hamill and Carter, and the deed from Carter and Walling to Hamill was also duly recorded. The petitioners filed their separate motions to dismiss the bill of complaint. Said motions raised issues of law, namely: Whether the suit, insofar as it affected the members of the State Highway Commission and J. Berry King as Attorney General of Oklahoma, was one against the sovereign State of Oklahoma and contrary to the 11th Amendment to the Constitution of the United States, and whether the franchises had expired by their own limitations when the order of dismissal was entered on May 29, 1931, and whether or not the franchises granted by the County Commissioners were perpetual and whether or not such franchises were inhibited by said provisions of the Oklahoma State Constitution, particularly Section 32 of Article 2 of said Constitution.

The trial court sustained the motions of the petitioners to dismiss the case, and in the written opinion filed in said

cause held that the secondary franchises were inhibited by Section 32, Article 2 of the State Constitution of Oklahoma as announced in the case of *The City of Okmulgee* v. *Okmulgee Gas Company*, 140 Okla. 88; 282 Pac. 640; that the secondary franchises were taken by individuals in trust for the Purcell-Lexington Toll Bridge Company and that such secondary franchises ceased to exist at the expiration of the corporate life of the Purcell-Lexington Toll Bridge Company.

The respondents herein appealed from the decision of the trial court to the Circuit Court of Appeals of the Tenth Circuit, and said Circuit Court of Appeals on April 14, 1932, reversed the decree of dismissal with direction to the court below to issue the injunction prayed for in the bill.

Your petitioners now seek to bring the matter before this Court for a writ of certiorari to review the action of the United States Circuit Court of Appeals for the Tenth Circuit of the United States on account of the errors of said court as hereinafter set out.

## STATEMENT OF THE ISSUES.

The petitioners, the members of the State Highway Commission of Oklahoma, and the Attorney General of Oklahoma, contended in the courts below that they were executive officers of the State of Oklahoma, and that in the exercise of their official duties represented the sovereign State of Oklahoma. That it was their duty to enforce the

laws pertaining to the State Highway system of the State of Oklahoma, and that the object of the suit was to preclude the individual members of the State Highway Commission of the State of Oklahoma and the Attorney General thereof from performing certain duties specifically enjoined from them as such executive officers of the State, and by reason thereof the action was in truth and in fact against the sovereign State of Oklahoma, and that it could not be maintained by reason of the 11th Amendment of the Constitution of the United States.

The remaining petitioners contended, with the aforesaid state officers, that the bill of complaint filed by the respondents did not state a cause of action.

As we understand the decision of the Circuit Court of Appeals, two points were decided in the opinion delivered by presiding Judge Lewis of said court:

First, that the secondary franchises, whether granted to individuals, or to the Bridge Company, were perpetual, and that there were neither constitutional nor statutory inhibitions against the granting of perpetual franchises, and that such secondary franchises were perpetual.

Second, that said suit, insofar as it affected the state officers named as defendants, was not a suit against the State.

**Point One.**

It is the contention of the petitioners that the secondary franchises were not perpetual and were limited to the life of the Purcell-Lexington Toll Bridge Company, which expired on May 18, 1931, and that under the terms thereof, the bridge structure became public property disburdened of tolls on said date.

Section 32, Article 2, Constitution of Oklahoma.
*City of Okmulgee* v. *Okmulgee Gas Company,* 140 Okla. 88, 282 Pac. 640.
*City of Okmulgee* v. *Okmulgee Gas Company,* 141 Okla. 98, 284 Pac. 70.
*City of Hugo* v. *Oklahoma Power Company,* 141 Okla. 100, 284 Pac. 12.
*City of Cushing* v. *Consolidated Gas Utilities Company,* 141 Okla. 82, 284 Pac. 38.
*In re Application of Consolidated Gas Utilities Company for Revocable Permit Under Chapter 102, Session Laws 1925, Relative to the Town of Tonkawa, Oklahoma,* No. 20766, Supreme Court of Oklahoma (not yet officially reported).
Chapter 34, Compiled Oklahoma Statutes 1921.
*Grove Bridge Company et al.* v. *State ex rel. etc.,* 133 Okla. 115, 271 Pac. 846.

The constitutional provision referred to inhibits perpetual franchises and the cases specifically so hold. The defendant in the Okmulgee Gas Company case reported in 140 Okla. 88, 282 Pac. 640, *supra,* in its petition for rehearing filed in the Supreme Court of Oklahoma, on pages 11 to 19, inclusive, especially urged that the Supreme Court of Oklahoma erred in holding that the franchise involved

in that case was inhibited by said Section 32, Article 2, *supra*, the perpetuity clause of the Oklahoma State Constitution. Therefore, the Circuit Court of Appeals decided an important question of local law in conflict with the decisions of the Supreme Court of the State of Oklahoma construing a constitutional provision of said State. It is contended by the petitioners herein that the decisions of the Supreme Court of Oklahoma construing said constitutional provision are controlling on the federal courts. It is further contended by these petitioners that if the opinion of the Circuit Court of Appeals becomes final that the same will nullify the opinion of the Supreme Court of Oklahoma construing said constitutional provision and that such decision presents an important question of general law, untenable and in conflict with the weight of authority.

**Point Two.**

Said suit was against the sovereign State of Oklahoma and inhibited by the 11th Amendment to the Constitution of the United States.

*State Banking Board* v. *Oklahoma Bankers Trust Company*, 63 Okla. 260, 145 Pac. 767.
*Lankford* v. *Schroeder*, 47 Okla. 279, 147 Pac. 1049.
*State Banking Board* v. *Oklahoma Bankers Trust Company*, 49 Okla. 72, 151 Pac. 586.
*Lankford* v. *Platt Iron Works Company*, 235 U. S. 461, 59 Law Edition 316.
*Love* v. *Filtsch*, 33 Okla. 131, 124 Pac. 30.
*Eidenmiller* v. *State*, 233 N. W. 447.

*Hampton* v. *State Board of Education*, 42 A. L. R. 1456 (Fla.).
*Stanley* v. *Schwalby*, 162 U. S. 255, 40 L. ed. 967.
*McDowell* v. *Fuller*, 169 Mich. 332, 135 N. W. 267.
*Ayers* v. *Board of Trustees*, 98 So. 847-850.
*Mississippi Centennial Exposition Company* v. *Luderback*, 123 Miss. 828, 86 So. 517.
*Norrah* v. *Dr. John De La Howe Industrial School*, 113 S. E. 70.
*Ex parte Ayers*, 123 U. S. 443, 31 L. ed. 216.
Section 1, Article 16, Oklahoma State Constitution.
Section 1, Chapter 68, Session Laws of Oklahoma 1929.
Chapter 48, Session Laws of Oklahoma 1923-24.
Chapter 82, Session Laws of Oklahoma 1927.
Chapter 245, Session Laws of Oklahoma 1929.
*Wentz et al.* v. *Ingenthron*, 146 Okla. 165, 294 Pac. 154.
*Wentz* v. *Board of County Commissioners of Lincoln County, Oklahoma*, 147 Okla. 173, 295 Pac. 599.
*Wentz et al.* v. *Dawson et al.*, 149 Okla. 94, 299 Pac. 493.
*Hawks et al.* v. *Seay et al.*, 150 Okla. 160, 1 Pac. (2d) 148.
*Poindexter* v. *Greenhowe*, 114 U. S. 270, 29 L. ed. 185.
*Long* v. *Highway Commission of Iowa*, 213 N. W. 532.
Section 1, Article 6, Oklahoma State Constitution.
*State Highway Commission of Wyoming* v. *Utah Construction Company*, 278 U. S. 194, 73 L. ed. 262.

Wherefore, petitioners pray that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit of the United States, requiring it to certify the

case to this Court and reverse its determination, as provided by the Judicial Code of the United States, and amendments thereto, or that your petitioners may have such other or further relief or remedy in the premises as this Court may deem appropriate and in conformity with the provisions of said Judicial Code, and that said judgment of the Circuit Court of Appeals of the Tenth Circuit of the United States, and every part thereof, may be reversed by this Honorable Court.

J. Berry King,
Attorney General of Oklahoma,
W. C. Lewis,
Assistant Attorney General of Oklahoma,

*Counsel for Petitioners.*

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JUN 10 1
CHARLES ELMORE

In the

# Supreme Court of the United States

**OCTOBER TERM, 1932.**

SAM HAWKS, J. F. MCKEEL and LEW WENTZ, constituting the State Highway Commission of Oklahoma; J. BERRY KING, Attorney General of Oklahoma; PURMAN WILSON, County Attorney of McClain County, Oklahoma; PERSON WOODALL, County Attorney of Cleveland County, Oklahoma; and J. R. EVATT, A. O. MADDOX, J. E. COLBERT, J. C. TODD, GEORGE CARPENTER and GEORGE N. CHURCH,

*Petitioners,*

vs.

CHARLES H. HAMILL and WILLOUGHBY G. WALLING,

*Respondents.*

**No. 147**

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

J. BERRY KING,
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Assistant Attorney General,
*Attorneys for Petitioners.*

Francis & Holden, Brief Printers, 523-5 West Second St., Oklahoma City. Phone 2-6245

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In the

# Supreme Court of the United States

OCTOBER TERM, 1932.

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SAM HAWKS, J. F. McKEEL and LEW WENTZ, constituting the State Highway Commission of Oklahoma; J. BERRY KING, Attorney General of Oklahoma; PURMAN WILSON, County Attorney of McClain County, Oklahoma; PERSON WOODALL, County Attorney of Cleveland County, Oklahoma; and J. R. EVATT, A. O. MADDOX, J. E. COLBERT, J. C. TODD, GEORGE CARPENTER and GEORGE N. CHURCH,

*Petitioners,*

vs.

CHARLES H. HAMILL and WILLOUGHBY G. WALLING,

*Respondents.*

No. 147

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### STATEMENT OF THE CASE.

The petitioners named in the caption hereof are state and county officers of the State of Oklahoma. The respondents are residents of Illinois and claim to be the owners of a certain bridge structure located over the South Canadian

River between the towns of Lexington, Oklahoma, and Purcell, Oklahoma.

The respondents filed their bill of complaint against the petitioners as defendants in the United States District Court for the Western District of Oklahoma, praying for the issuance of an injunction against the petitioners and other persons preventing the operation of the toll bridge and collection of tolls for the use of same by respondents.

The bill contained the usual allegation as to diversity of citizenship and the amount in controversy. We will not attempt to set forth the allegations of the bill as the same are copied in narrative form on pages 3 to 8, inclusive, of the petition for writ of certiorari filed herein, and the same is copied in *haec verba* in the transcript of record filed herein beginning on page 3 and continuing to page 27, inclusive thereof. Without here repeating the allegations, we deem it sufficient to state that respondents in said action contended that they were the owners of that certain bridge property involved and described in the bill of complaint, and it is the contention of the petitioners herein that such bridge property became public property disburdened of tolls on the 18th day of May, 1931.

A temporary restraining order was issued by the court on May 15, 1931, and the case proceeded to trial thereafter on May 23, 1931. The petitioners herein filed their separate

motions to dismiss the bill of complaint and said motions raised issues of law. The trial court sustained the motions of the petitioners to dismiss the case and the respondents herein appealed from the decision of the trial court to the Circuit Court of Appeals of the Tenth Circuit, and said court on April 14, 1932, reversed the decree of dismissal with direction to the court below to issue the injunction prayed for in the bill. Within the time prescribed by law the petitioners filed this petition for writ of certiorari in this Honorable Court in accordance with the rules thereof.

As a part of the petition for the writ of certiorari filed herein, we made a statement of the issues and cited certain cases which we think applicable and decisive of the questions involved herein. However, in order that the Court may have a more extended brief in support of point number one, appearing on page 12 of the petition for writ of certiorari, we desire to call the Court's attention to the following cases, provisions of law and constitutional enactments of the State of Oklahoma.

The law of Oklahoma under which the Purcell-Lexington Toll Bridge Company was incorporated is found in Sections 5366 to 5375, inclusive, Compiled Oklahoma Statutes 1921. The life of the toll bridge corporation under such law is limited to twenty years from the time of the issuance of the charter which was issued to the Purcell-Lexington Toll Bridge Company on May 18, 1911. No bridge company

may operate a toll bridge after having received its charter until it shall have received authority from the county commissioners of the counties in which the bridge is located to operate the same, under the provisions of Section 5367, Compiled Oklahoma Statutes 1921.

It was the contention of the petitioners herein in the case below that even though the secondary franchise was granted to individuals, some of whom were the incorporators of the Purcell-Lexington Toll Bridge Company, just a few days before the articles of incorporation were filed, that such secondary franchise was taken by said individuals as trustees for the corporation subsequently filed. That therefore the duration of the secondary franchise was limited to twenty years from the date of the incorporation of the Purcell-Lexington Toll Bridge Company. Section 5366, *supra*, is very specific in its terms that the existence of a bridge corporation shall not exceed twenty years. If we were correct in our contention that the individuals who were the grantees in the secondary franchise were trustees for the corporation later formed, then said secondary franchise was limited to a duration of twenty years from May 18, 1911, and expired on May 18, 1931.

It is well established by an abundance of authorities that where a franchise fixes no period of duration, its period is limited to the life or existence of the grantee.

*St. Claire* v. *Illinois*, 96 U. S. 63, 24 L. ed. 651.
*Blair* v. *Chicago*, 201 U. S. 400, 50 L. ed. 801.
*Charles River Bridge*, 11 P. 420, 9 L. ed. 773.
*Perrine* v. *Chesapeake*, 9 How. 172, 13 L. ed. 92.
*Binghampton Bridge Case*, 3 Wall. 51, 18 L. ed. 137.
*Northwestern Fertilizer* v. *Hyde Park*, 97 U. S. 659, 24 L. ed. 1036.

It may be argued that on account of the language used in the secondary franchise: "That the grants herein made shall be perpetual, subject only to such limitations as is by law now or may be hereafter provided" conveys a franchise in perpetuity. Such was the holding of Judge Lewis in the opinion rendered on April 14, 1932, in the Circuit Court of Appeals. But in arriving at the correctness of such conclusion, it was incumbent upon Judge Lewis and is upon this Honorable Court, to take into consideration the general principle of law "that grants of franchise and special privileges are always to be construed most strongly against the donee and in favor of the public."

In addition to the statutes and cases referred to herein, we desire to call this Honorable Court's attention to Section 32, Article 2, Constitution of Oklahoma, which is as follows: "Perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed nor shall the law of *primo geniture* or entailments ever be enforced in this State."

The Supreme Court of Oklahoma in the first five cases

cited under point one on page 12 of the petition for writ of certiorari announced the rule that perpetual franchises are inhibited by reason of Section 32, Article 2 of the Oklahoma Constitution.

In the case of *City of Okmulgee* v. *Okmulgee Gas Company*, 282 Pac. 640, in paragraph one of the syllabus, the court held that a perpetual franchise violates said section of the Constitution. On page 649 of the quoted volume, Judge Swindall used the following language:

> "All of the authorities that we have been able to find hold that, where a franchise is not limited in its existence to a fixed and definite period of years, then the same is a perpetual franchise, and if we should hold that Section 5(a) of Article 18 was intended by the framers of the Constitution to limit only the powers of municipalities in granting franchises, and that the legislature had the power to grant a franchise or provide for the surrendering of a limited franchise granted by a municipal corporation and accept in lieu thereof a revocable permit without limit as to time of existence, in other words, a perpetual franchise, and thus extricate House Bill No. 4, from the control of Section 5(a) of Article 18, *supra, then it would run into the teeth of Section 32 of Article 2 of the Constitution, which provides that: 'Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed'.*"

The following rule of law is well established by the cases appearing following the quotation: "Grants of franchises in perpetuity or for unreasonably long period of time, are generally regarded as against public policy and if ever valid, the

authority therefor must be found in the Constitution or statutes of the State."

*Richmond Co. Gaslight Co.* v. *Town of Middletown,* 59 N. Y. 228.
*City of Brenham* v. *Brenham Water Co.,* 67 Tex. 542, 4 S. W. 143.
*Long* v. *City of Duluth,* 49 Minn. 280, 51 N. W. 913, 32 Am. St. Rep. 547.
*Thrift* v. *Elizabeth City,* 122 N. C. 31, 30 S. E. 349, 44 L. R. A. 427.
*Cedar Rapids Water Company* v. *City of Cedar Rapids,* 118 Iowa 234, 91 N. W. 1081.
*John Stiles* v. *Charles Norton,* 125 Ky. 672, 101 S. W. 1189, 13 L. R. A. (N. S.) 474.

We understand the law to be that the decisions of the state courts on a question of local law are conclusive in the Federal Supreme Court and that decisions of the Supreme Court of the State having to do with the validity, construction and effect of State Constitutions and statutes are also binding upon the Federal Courts.

The following cases support this view:

*Illinois C. R. Co.* v. *Chicago,* 176 U. S. 646, 44 L. ed. 622.
*McIver* v. *Walker,* 4 Wheat. 444, 4 Law ed. 611.
*Palmer* v. *Ohio,* 248 U. S. 32, 63 L. ed. 108.
*Luther* v. *Borden,* 7 How. 1, 12 Law ed. 581.

With the above authorities and those cited on page 12 under point one of the petition for writ of certiorari filed herein, it is urged by the petitioners herein that Judge Lewis erred in holding that the secondary franchise of the bridge

company was perpetual, and that by reason thereof, this Honorable Court should grant the petition for a writ of certiorari in order that the proceedings may be reviewed by this Honorable Court.

The remaining question presented in the petition for writ of certiorari is found under point 2, page 13 of said petition filed herein, and is whether or not the bill of complaint filed by the respondents constitutes a suit against the sovereign State of Oklahoma, and therefore inhibited by the 11th Amendment to the Constitution of the United States.

We have called the Court's attention to cases which we think decisive of this point on pages 13 and 14 of the petition for writ of certiorari filed herein.

We think the cases of *Ex parte Ayers*, 123 U. S. 443, 31 L. ed. 216, and *State Highway Commission of Wyoming* v. *Utah Construction Company*, 278 U. S. 194, 73 L. ed. 262, sustained the position of the petitioners herein.

The Utah Construction case, *supra*, so far as we have been able to ascertain, is the latest expression of this Honorable Court upon the question of whether or not a suit against a Highway Commission, an executive department of the State, is a suit against the State. This Court is familiar with the decision rendered in said case, and without elucidating upon the same, suffices it to state that this Honorable Court held in said case that a suit brought by the Utah Con-

struction Company against The State Highway Commission of Wyoming was in fact a suit against the sovereign State of Wyoming and could not be maintained.

In conclusion, the petitioners herein respectfully urge this Honorable Court in considering this petition for writ of certiorari and the record herein, that it consider all the constitutional and statutory enactments referred to and the authorities cited in support of the petition for writ of certiorari and all cases cited therein in addition to the cases referred to in this additional brief, and that upon consideration of the same, that the Court grant the petition and permit the briefing thereof and submission to this Honorable Court.

Respectfully submitted,

J. Berry King,
Attorney General of Oklahoma,
W. C. Lewis,
Assistant Attorney General,
*Attorneys for Petitioners.*

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# Supreme Court of the United States

## OCTOBER TERM, 1932.

SAM HAWKS, J. F. McKEEL and LEW WENTZ Constituting the State Highway Commission of Oklahoma; J. BERRY KING, Attorney General of Oklahoma; PURMAN WILSON, County Attorney of McClain County, Oklahoma; PERSON WOODALL, County Attorney of Cleveland County, Oklahoma; and J. R. EVATT, A. O. MADDOX, J. E. COLBERT, J. C. TODD, GEORGE CARPENTER and GEORGE N. CHURCH,

*Petitioners,*

vs.

CHARLES H. HAMILL and WILLOUGHBY G. WALLING,

*Respondents.*

No. 147

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(c) The court will look through and beyond the nominal parties of this action and determine who is the real party in interest, and although the State is not specifically named party defendant, nevertheless, if it appears that the State is the real party in interest and will be affected by the judgment, the suit will be dismissed for want of an indispensable party ---- 37

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(e) The object of this suit is to preclude the individual members of the State Highway Commission of the State of Oklahoma, and the Attorney General thereof, from performing those duties specifically enjoined upon them as executive officers of the State of Oklahoma. It seeks to preclude them from enforcing a contract made and entered into by the State of Oklahoma and the Purcell-Lexington Toll Bridge Company. An action against such officers to prevent the discharge of their official duties is an action against the State and cannot be maintained ---- 40

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# Supreme Court of the United States

OCTOBER TERM, 1932.

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SAM HAWKS, J. F. McKEEL and LEW WENTZ Constituting the State Highway Commission of Oklahoma; J. BERRY KING, Attorney General of Oklahoma; PURMAN WILSON, County Attorney of McClain County, Oklahoma; PERSON WOODALL, County Attorney of Cleveland County, Oklahoma; and J. R. EVATT, A. O. MADDOX, J. E. COLBERT, J. C. TODD, GEORGE CARPENTER and GEORGE N. CHURCH,

*Petitioners,*

vs.

CHARLES H. HAMILL and WILLOUGHBY G. WALLING,

*Respondents.*

No. 147

---

## BRIEF OF PETITIONERS

---

Opinion Below, 58 Fed. (2d) 41.

## JURISDICTION.

This Court granted Application for Writ of Certiorari on the tenth day of October, 1932.

## STATEMENT OF THE CASE.

The petitioners, Sam Hawks, J. F. McKeel and Lew Wentz, constitute the State Highway Commission of Oklahoma, and J. Berry King, is the duly elected, qualified and acting Attorney General of said State, all being officers of the Executive Department of the sovereign State of Oklahoma.

The remaining petitioners, J. R. Evatt, and others named in order, are county officers of McClain and Cleveland Counties, Oklahoma. The respondents, Charles H. Hamill and Willoughby G. Walling, are residents of the State of Illinois and claim to be the owners of a certain bridge structure located over the South Canadian River between the towns of Lexington, Cleveland County, Oklahoma, and Purcell, McClain County, Oklahoma.

The respondents filed their Bill of Complaint (R. 3-27) against the petitioners herein as defendants in the United States District Court for the Western District of Oklahoma, seeking an injunction against the petitioners herein and other persons from interfering with the respondents in the operation of the Purcell-Lexington Toll Bridge and the collection of tolls by respondents from all persons using said bridge.

The Bill contained the usual allegations as to diversity

of citizenship and amount in controversy. We will not enumerate the allegations of the Bill as the same are copied at length on pages 3 to 27, inclusive, of the record herein.

A temporary restraining order was issued by the trial court on May 15, 1931 (R. 27-28) and the case proceeded to trial thereafter on May 23, 1931.

The petitioners herein filed their separate motions to dismiss the Bill of Complaint (R. 31-33). These motions raised issues of law. The trial court sustained the motions of the petitioners to dismiss the case (R. 33-43). The respondents appealed from the decision of the trial court to the Circuit Court of Appeals of the Tenth Circuit, and said court on April 14, 1932, reversed the decree of dismissal with directions to the court below to issue the injunction prayed for in said Bill (R. 81-94).

Within the time prescribed by law, the petitioners filed their petition for a writ of certiorari in this Honorable Court, and on October 10, 1932, this Court granted such application. As a part of the petition for a writ of certiorari filed herein, we made a statement of the issues and cited certain cases which we think applicable and decisive of the questions involved herein. (Petition for Writ of Certiorari 2-14).

## QUESTIONS PRESENTED.

### Part 1

The law of Oklahoma, under which the Purcell-Lexington Toll Bridge Company was incorporated, is found in Sections 5366 to 5375, inclusive, Compiled Oklahoma Statutes, 1921. (See Appendix.)

The existence of a toll bridge corporation under such law is limited to twenty years from the time of the issuance of a charter thereof. The charter of the Bridge Company was issued by the Secretary of State on May 18, 1931. A Bridge Company may not operate a toll bridge after having received its charter unless it shall have received authority from the County Commissioners of the counties in which the bridge is to be located, authorizing the operation of the same under the provisions of Section 5367, *supra*.

It was contended by petitioners herein in the case below that even though the secondary franchises were granted to individuals, some of whom were the incorporators of the Purcell-Lexington Toll Bridge Company, just a few days prior to the filing of the Article of Incorporation, that such franchises taken by the said individuals as trustees for the corporation subsequently organized and that the duration of the secondary franchises were limited to twenty years from the date of the incorporation of the Bridge Company. It was

further contended by the petitioners in the court below that where franchises fix no period of duration, such period is limited to the life or existence of the grantee.

It was further contended by the petitioners that such secondary franchises could not be perpetual and that the same were inhibited by Section 32, Article 2 of the Constitution of the State of Oklahoma, as announced in the case of *The City of Okmulgee* v. *Okmulgee Gas Company*, 140 Okla. 88, 282 Pac. 640, by the Supreme Court of the State of Oklahoma.

It is, therefore, contended under this point that the secondary franchises, whether granted to individuals or to the Bridge Company, were limited as to duration and existence to a period of twenty years from the date of the issuance of the corporate charter of the Bridge Company, and that such secondary franchises were not perpetual.

**Part 2.**

The petitioners contended in the court below that such suit insofar as it related to the State Officers named as defendants, was a suit against the sovereign State of Oklahoma, and inhibited by the 11th Amendment to the Constitution of the United States.

## SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals of the Tenth Circuit erred in holding that counties were not prohibited from granting to individuals and their assigns, perpetual rights to construct and maintain toll bridges.

2. Said court erred in holding that a corporation to which toll bridge franchises were transferred, was entitled to convey its franchise rights to individuals and that such rights were [illegible]ed in their duration to the life or term of the co[illegible]

[illegible]erred in holding that the franchises involved in [illegible]were perpetual, assignable and extended beyond [illegible]r lives of the grantees, whether corporate or individual. Said court erred in holding that the Legislature of Oklahoma in empowering counties to issue toll bridge franchises and counties in granting them, acted in discharge of proprietary or business, not governmental powers, so that the relations between them and grantees of such franchises were contractual.

4. Said court erred in construing the term "perpetuities" as used in Section 32, Article 2 of the Oklahoma Constitution as intended to limit the power to pass titles to realty vesting in futuro and is not equivalent to perpetual franchises.

5. The court erred in holding that the action against the Attorney General and State Highway Commissioners of Oklahoma in the instant case was not a suit against the sovereign State of Oklahoma.

## SUMMARY OF ARGUMENT

### Part 1

It is contended by the petitioners herein that the secondary franchises were not perpetual, but were limited in their duration to the corporate life or existence of the Purcell-Lexington Toll Bridge Company. That the corporate existence of said Bridge Company terminated on May 18, 1931, and that the bridge property and all rights connected therewith became public property disburdened of tolls on said date.

### Part 2

The petitioners further contend that such suit insofar as it relates to the members of the State Highway Commission and the Attorney General of Oklahoma is inhibited by the 11th Amendment to the Constitution of the United States. That under said Amendment before the respondents herein could have instituted this suit, it was necessary to obtain the consent of the Legislature of the State of Oklahoma so to do.

## ARGUMENT.

### Part 1

**The franchises involved in this case ran concurrent with the corporate existence of the Purcell-Lexington Toll Bridge Company and were limited in their duration to a period of twenty years from the expiration date of said corporation, to-wit, May 18, 1931.**

The Bridge Corporation Act appears as Article 6, Chapter 35, Compiled Oklahoma Statutes, 1921. This Article consists of Sections 5366 to 5369, inclusive, Compiled Oklahoma Statutes, 1921. (See Appendix.)

Section 5369, *infra*, provides that the bridge must be kept in good condition. Section 5371, *infra*, provides the penalty for permitting the bridge to become in bad condition. Section 5372, *infra*, relates to the collection of tolls by toll gatherers. Section 5373,*infra*, fixes the penalty for forcibly passing over the bridge. Section 5374,*infra*, authorizes an annual report to the Board of County Commissioners, and Section 5375, *infra*, provides that the report required by said Section 5374 be published and fixes a penalty for non-compliance therewith.

The pleadings and evidence in this case (R. 3-71) show conclusively that Carter and his associates proceeded under

the provisions of Article 6, Chapter 34, *infra,* in the obtaining of the secondary franchise from the County Commissioners of said counties, and in securing the primary franchises (Corporate Charter) from the State of Oklahoma; and that Carter, an attorney, contemplated when he obtained the secondary franchise that he would form a corporation to construct and operate the toll bridge authorized thereby. (R. 63-67).

Carter adroitly sought to evade answering the question as to whether he proceeded under the Wagon Road Act (See Appendix) or Toll Bridge Corporation Act (R. 66—). His acts in connection therewith and the records concerning the same pleaded in the Bill of Complaint and shown in the evidence speak more forcibly than oral testimony. It will be observed by reading the grants secured by Carter, et al, from the County Commissioners of McClain County, Oklahoma, (R. 13-20) they followed the provisions of Section 5367, *infra,* part of the Bridge Corporation Article, and that the Commissioners granted said parties a right to construct, erect, maintain, and operate a toll bridge and collect tolls thereon across the South Canadian River; that said grant further provided that the bridge should be erected within the time provided by law, or said grant would be null and void; and that said bridge should be constructed across the South Canadian River, near Purcell, and extend across said river, and certain tolls were authorized to be charged for the use thereof. (See Appendix where said franchise is quoted at length).

The grant further provided that the toll should not be increased except as may now or hereafter be legally provided, but that the same might be reduced by said *Bridge Company* upon the posting of proper notices as provided by law. The grant and the terms employed therein was prepared by Carter (R. 64-67). A review of the same discloses that they were drawn to comply with said Sections 5366, 5367 and 5370, *infra*. The terms used were not loosely employed, but carefully couched in legal language to comply with the provisions of the sections just referred to.

Under the first paragraph of the grant, Carter was following the provisions of Section 5367, *infra*, which required authority of the County Commissioners of the County in which a part of the bridge was located before the bridge corporation could construct a toll bridge, or collect tolls thereon. The grant specifically states:

> "Said bridge to be erected within the time as provided by law, or else that authority is null and void."

The Cleveland County grant (R. 16-17), (See Appendix) is couched in the same language as the McClain County grant. This provision was to comply with Section 5368, *infra*, which provided that any bridge corporation ceases to be a body corporate unless within six months of the issuance of its certificate by the Secretary of State, it has obtained the legal

authority required by Section 5367, *infra.* Carter and his associates who obtained the secondary franchises as trustees for the bridge company to be formed, followed the provisions of Section 5366, *infra,* by designating the place where said bridge was to be constructed. The rate of tolls was fixed in said franchise as was authorized by Section 5367, *infra.*

The grants further provided in substance that the rate of tolls should not be increased, but might be reduced by the *Bridge Company* by posting notices as required by law. This requirement of the statute is provided in Section 5370, *infra.* As stated by the trial judge in his written opinion (R. 33-40), it is obvious from the grants that the grantees were not endeavoring to proceed under the Wagon Road Corporation Article, but that it was quite clear from the same that an effort was made to comply with the Toll Bridge Corporation Article. The intention of Mr. Carter and his associates to comply with the Toll Bridge Corporation Article is evidenced by the Article of Incorporation of the Purcell-Lexington Toll Bridge Company (R. 67-69), which is as follows:

> "First. That the name of this corporation shall be Purcell-Lexington Toll Bridge Company.
>
> "Second. That the purposes for which this corporation is formed are to erect, construct, build and maintain, or to lease or purchase and operate a toll bridge, and the approaches thereto, over and across the South Canadian

River at or near the City of Purcell, McClain County, Oklahoma to the East banks of said river into Cleveland County, Oklahoma, for the passage of footmen. passengers, cattle and vehicles of all kinds, and the wires for the transmission of electric currents for speech, light or power, and for pipes and mains for water and gas; and to collect and receive *tolls for such service; and* to lease or sell such rights over said bridge and the approaches thereto.

"Third. That the banks on the West side of said South Canadian River at, or near Purcell, McClain County, State of Oklahoma, on which said bridge is to be constructed, *is owned by said corporation,* and that on the East side of said river, to-wit, Cleveland County, Oklahoma, it is the purpose of said corporation to construct said bridge so as the same will have landing in public highway situated on the section line between sections six (6) and seven (7), township six (6) North, Range one (1) West, and *that said corporation has obtained in writing the consent of the Board of County Commissioners of Cleveland County for the erection of such bridge.*

* * * * * * * * *

"Fifth. That the terms for which the corporation is to exist is twenty (20) years."

These provisions are specifically required by Section 5366, *infra.* The Articles of Incorporation were subscribed to by three residents of Oklahoma. (Walling and Hamill be-

ing non-residents, and the law requires two-thirds of the incorporators to be residents of Oklahoma.)

In the Articles of Incorporation, the name of the stream over which the bridge was to be constructed and the place thereon is named and said Articles specifically state that the West end of the bridge is to be located at or near Purcell, Oklahoma, and *is owned by the corporation* and that the East end of the bridge located in Cleveland County was to be located in a public highway, *and that said corporation has obtained in writing the consent of the Board of County Commissioners,* and that the term of the existence thereof is to be twenty years. Comparing these provisions of the Articles of Incorporation with the requirements of Section 5366, *infra,* it will be seen that Carter, in preparing the same, followed the provisions of said section in the identical manner and order set forth therein. The Articles of Incorporation were certified by the Secetary of State on May 18, 1911. The McClain County secondary franchise is dated April 22, 1911, and the Cleveland County franchise is dated May 16, 1911. These instruments established the corrrectness of the opinion of the trial court in holding that the grants were taken by Carter, et al, for the benefit of the Toll Bridge Company, which such persons caused to be performed immediately after receiving said grants. (R. 13-17 and 67-69).

It is contended by the respondents herein that Carter and Halsell were granted the secondary franchise under the provisions of Article 18, Chapter 34, Compiled Oklahoma Statutes, 1921. (This Article is composed of Sections 5625 to 5636 inclusive, Compiled Oklahoma Statutes, 1921). (See Appendix). It is contended by respondents that said franchises were granted under the provisions of Sections 5627 and 5636, *infra*. By reading these sections it will be seen that the County Commissioners did not grant the franchises by reason of the authority therein contained. Especially is this true when we consider Sections 5625 and 5627, in their entirety. Section 5636, *infra*, makes the provisions of said Article 18, Chapter 34, *infra*, applicable to wagon, turn pike, and plank road, constructed, owned and operated by natural persons.

In the Bill filed by the respondents in this case it is not contended that Carter and his associates proceeded under the provisions of said Article 18, *infra*. They do not plead that said trustees followed in any manner the provisions of said Article 18, Chapter 34, *infra*, relative to the establishment of toll roads. The record discloses that none of the essential requirements of the Wagon Road Corporation Act were complied with by Carter and his associates. On the contrary, all the requirements of the Toll Bridge Corporation Article were complied with by said persons. If it be contended by the respondents that the fact that Carter, et al, secured the title

to the lands upon which the approaches or the West end of the bridge, were located in Purcell, Oklahoma, and that same was obtained for the purpose of laying out a proposed road under the provisions of the Wagon Road Act, we point out to the Court that not a single provision of said Act was complied with by said persons. On the contrary it is specifically stated in the Articles of Incorporation that the banks on the West side of the Canadian River on which the bridge is to be constructed is owned by said *Corporation.* This is a strict compliance with Section 5366, *infra,* a part of the toll Bridge Corporation Article. Said Article is further complied with in the Article of Incorporation, wherein it is stated that *said Corporation* has obtained in writing the consent of the Board of County Commissioners of Cleveland County for the erection of the bridge on a part of a public highway. This statement is in compliance with another requirement of said Section 5366, *infra.*

The facts in this case are as evidenced, by the Bill of Complaint, the exhibits thereto, the Articles of Incorporation referred to in the roads herein, and the testimony introduced, that it was not the intention of Carter and his associates to comply with the Wagon Road Corporation Article.

This position was never taken until after the Toll Bridge Company filed its suit against the Secretary of State of Ok-

lahoma in the District Court of Oklahoma County on June 7, 1929, in which it sought a return of mandamus to require the Secretary of State to cause an amended charter to be issued to the Purcell-Lexington Toll Bridge Company extending the time of its existence for a period of twenty years from the 23rd of March, 1929. Said case is reported in 148 Okla. 27, 296 Pac. 969. At the close of the hearing in the court below the trial judge (R. 22-40) made the observation that he was of the opinion that there was no authority within the statutes of the State of Oklahoma authorizing the granting of a perpetual franchise to individuals under the provisions of Article 6, Chapter 34, *infra;* and that when the charter of the corporation organized thereunder expired, the bridge and the road leading thereto having been dedicated to the public, reverted to the State disencumbered of any right to collect toll. Such was his holding in the written opinion( R. 33-40). From a consideration of Sections 5366 and 5367, *infra,* it is clear that the latter section is a limitation upon the power of the corporation created under the authority of Section 5366. Such corporation is not authorized to collect toll unless it obtains authority from the County Commissioners of the county where such bridge is located. This authority could not be extended by the County Commissioners beyond the life of the corporation. Only corporations chartered for a period of twenty years have authority to build and operate toll

bridges over the streams of the State of Oklahoma, under said Article 6, Chapter 34.

This position has received Legislative sanction by the expression of the Oklahoma Legislature as evidenced by Section 1, Chapter 257, Session Laws, 1929. (See Appendix). This statute was effective on June 10, 1929. The Legislature was conversant with the fact that the Purcell-Lexington Toll Bridge Company had brought the mandamus proceeding above referred to in the Supreme Court seeking to extend the corporate and franchise lofe of said company. The Act clearly establishes a legislative view to the effect that a toll bridge corporation cannot extend its corporate life or franchise rights beyond the period of the original corporate life.

The corporate existence of the Bridge Company being limited to twenty years, it is beyond the power and authority of the County Commissioners to authorize the collection of tolls by said corporation or its assigns for more than twenty years from the date of the issuance of the charter of the corporation. It, therefore, follows under the laws of the State of Oklahoma that a toll bridge corporation such as the Purcell-Lexington Company must not only have a charter, its primary franchise, but it must also have a secondary franchise granted by the Board of County Commissioners authorizing it to collect tolls.

Section 5367, *infra*, deals with the secondary franchises and contains a specific prohibition against the collection of tolls by a corporation organized thereunder until the secondary franchise is obtained.

It is well established in the State of Oklahoma, and other jurisdictions, that public officers have only such authority as is conferred upon them by law, and that such authority must be exercised in the manner prescribed by law.

*National Surety Company* v. *Sand Springs Bank*, 74, Okla. 176, 177 Pac. 574;

*National Drill Mfg. Co.* v. *Davis*, 29 Okla. 625, 120 Pac. 976;

*Harlow* v. *Board of Commissioners*, 33 Okla. 353, 125 Pac. 449;

*Coyle* v. *Board of Commissioners*, 38 Okla. 370, 132 Pac. 1113;

*Dolezal* v. *Bostick*, 41 Okla. 734, 139 Pac. 964;

*Board of Commissioners* v. *Ernest*, 45 Okla. 725, 147 Pac. 322;

*Board of Commissioners* v. *Smith*, 47 Okla. 184, 148 Pac. 111.

*News-Dispatch Ptg. & Audit Co.* v. *Board of Commissioners*, 61 Okla. 259, 161 Pac. 207.

*Assessment of First National Bank of El Reno*, 64 Okla. 208, 166 Pac. 883;

*Scott* v. *Board of Commissioners*, 100 Okla. 77, 227 Pac. 448;

*Allen* v. *Board of County Commissioners of Pittsburgh County*, 28 Okla. 773, 116 Pac. 175.

The Supreme Court of Oklahoma held:

> "It is a settled rule of construction that the granting of power to a Board of County Commissioners must be strictly construed, and that such board, when acting under specific authority, must act strictly on the conditions under which the authority is given, and exercise only such powers as are especially granted, or as are incidentally necessary for the purpose of carrying into effect such powers."

This rule of law applies to the granting of franchises as is stated in 26 C. J., Section 47, page 1026, as follows:

> "The agent, or agency, to whom the power is delegated must keep within its, or his, restricted authority and a granting of a franchise is inoperative insofar as it may be in excess of the powers delegated. • • • "

See *Denver Railroad Company* v. *Denver City Railroad Company,* 2 Col. 673;

In *Knapp* v. *Supreme Commandery,* 118 S. W. 390, the Supreme Court of Tennessee held:

> "All statutes under which corporate power is asserted must be construed in favor of the State from which the power emanated, and against the grant of power."

In *Chicago, Rock Island & Pac. Ry. Co.* v. *Taylor,* 79 Okla. 142, 192 Pac. 349, the Supreme Court of Oklahoma in the 8th syllabus, sub-division 2, held:

"That franchises and rights-of-way granted by the public are to be construed strictly against the grantee and liberally in favor of the public."

The granting of the secondary franchise required by Section 5367, *infra,* has been delegated to the Board of County Commissioners. Section 5366, *supra,* contains a specific prohibition that no toll bridge corporation shall exist for a longer period than twenty years. It is therefore quite apparent that the County Commissioners have power only to grant a secondary franchise to a company originally incorporated, and that such secondary franchise may not exist longer than twenty years. No authority of any kind or character is given the Board of County Commissioners to in any way extend or renew the secondary franchise, and this not having been expressly granted, such board is without authority to in any way extend the life or term of the original secondary franchise. Therefore, the secondary franchise obtained by Carter and Halsell, as trustees for the Bridge Company, expired at the same time the original charter expired, to-wit, May 18, 1931.

The respondents contend that the case of *Postal Bridge Company* v. *State, ex rel. Dabney,* 139 Okla. 225, 282 Pac. 462, holds that the granting of a franchise to operate a toll bridge is not limited to a toll bridge corporation organized pursuant to Section 5366, *infra.*

We desire to call the Court's attention to the fact that the Supreme Court of Oklahoma in said case had before it a secondary franchise issued by a Board of County Commissioners to construct a toll bridge and collect tolls thereon. At page 464 of the cited volume, the court used the following language:

> "The franchise is a grant from the State as compensation for the building of the bridge, and if there was no valid franchise there could not be a valid dedication."

And at page 464 of the same volume the court held:

> "So the contract of the DeLuxe Bridge Company with the State of Oklahoma was for the building, dedication and maintaining of this bridge and the consideration was the right to collect tolls for the period specified in the franchise as limited by the statutes of the State of Oklahoma."

This case clearly holds that the Board of County Commissioners is without authority to extend the secondary franchise owned by the Bridge Company because there would be no consideration therefor. The court in said case merely held that a toll bridge might be operated under the law authorizing wagon road corporations where the bridge was a part of the wagon road, and connected parts of the same.

It did not hold that individuals, or firms, could operate

and maintain a toll bridge erected by a Toll Bridge Corporation organized under the provisions of Section 5366, *infra*, nor did it hold that a Bridge Company organized under the provisions of said Article could legally convey a right to its assigns to operate a bridge perpetually, or beyond the corporate life of such Bridge Corporation.

The franchise granted the DeLuxe Company, a corporation organized under the provisions of Section 5366, *infra*, had not expired by its own limitations when the same was assigned to the Postal Bridge Company.

In the instant case the secondary franchise expired shortly after the corporation sought to transfer the title to said bridge and its properties to the individual members, who constituted the directors of said corporation.

The court in the Postal Bridge case held that the franchise acquired by the DeLuxe Company could be assigned to the Postal Company subject to the limitations imposed in the secondary franchise. Sections 2 and 3 of the syllabus, are in order as follows:

> "A corporation having a franchise to operate a toll bridge may sell and assign said franchise to an express trust but, the express trust or assignee takes said franchise subject to the same expiration period, and is bound to discharge the same duties, and is liable to the same regulations, penalties, and forfeiture as before such sale.

"Where said assignee has complied with all the provisions of the franchise and said franchise has not expired, an injunction will not lie to enjoin collection of toll charges."

Said case is, therefore, not an authority for the contention of the respondents that the franchise was granted to individuals under the provisions of the Article known as the Wagon Road Corporation Article.

It was stated in the opinion in the Postal Bridge case that the DeLuxe Company was organized under the provisions of Section 5366, *infra,* and it was admitted that the franchise period authorized by the Articles of Incorporation of the DeLuxe Company had not expired. The court properly held, in our judgment, that until that term expired such right could be transferred to any person, firm or corporation and enjoyed until the same expired by its own limitations.

The opinion held in effect that such persons, firm or corporation, would have no authority to operate the bridge and collect tolls thereon until after the expiration of the corporate period of the DeLuxe Company.

Inasmuch as the primary and secondary franchises of the Purcell-Lexington Toll Bridge Company have expired and the bridge structure involved in this case has become public property disencumbered of tolls the State officers who are now

the petitioners herein, would have been derelict in their duty if they had attempted to acquire the property under the provisions of Chapter 256, Session Laws 1929, which authorizes the acquiring of toll bridges by the State Highway Commission. Had the Highway Commission sought to expend public funds of Oklahoma in purchasing the same, it could and should have been enjoined from so doing. Likewise it is not necessary for the Legislature to exercise the power conferred upon it by Section 47, Article 9 of the Constitution of Oklahoma relative to altering, amending, cancelling, revoking, and repealing corporations and franchises, as both the primary franchise and the secondary franchise in the instant case have expired.

This position is further sustained in the case of the *City of Okmulgee* v. *Okmulgee Gas Company*, 140 Okla. 88, 282 Pac. 640. The rule is stated in the first paragraph of the syllabus as follows:

> "Chapter 102, Session Acts of the Tenth Legislature of Oklahoma, 1925, commonly known as House Bill No. 4, being an Act relating to the business of furnishing power, light, heat, gas, electricity or water in cities and towns, authorizing the surrender of municipal franchises in exchange for revocable permits, requiring certificates of convenience and necessity, and providing for the determination and issuance thereof, and repealing Acts in conflict therewith, by its terms authorizing any person, firm, association, or corporation, now or hereafter engaging in the business of furnishing power, light, heat,

gas, electricity, or water as a public utility in any city or town in this State under a municipal franchise now in existence or hereafter granted at any time before the expiration of such franchise but not thereafter, to file with the clerk of the municipal corporation which granted such franchise and with the Corporation Commission of the State of Oklahoma a written declaration and agreement issued in the manner required for the execution of conveyances of real estate, that it surrender such municipal franchise for the purposes mentioned in said Act, and, in consideration, the utility surrendering the same shall, by operation of law, receive in lieu of such surrendered franchise a permit from the state revocable only by the Legislature of Oklahoma whenever in its opinion such permit may be injurious to the citizens of this state, in such manner, however, that no injustice shall be done to the holder of such permit, in effect authorizes the converting of a limited franchise into a perpetual franchise, *and therefore violates Section* 32 *of Article* 2 *of the Constitution, which declares that perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed.*"

We maintain that Judge Lewis reached the wrong conclusion when he held that the perpetuity clause of the Oklahoma State Constitution (Section 32, Article 2) was not applicable to the secondary franchise involved in this case. This position is sustained by the City of Okmulgee case, *supra.*

It was observed by Judge Swindall who wrote the opinion, 282 Pac. 651, that "Any Act of the Legislature which pro-

vides for issuing a license, revocable permit, indeterminate permit, or other instrument in the nature of a franchise which is not limited as to its life or existence, violates Section 32 of Article 2 of our Constitution."

It will be contended by the respondents that the City of Okmulgee case does not apply as the court was then dealing with franchises granted by municipalities to public utilities, and that the opinion of the Oklahoma Supreme Court in said case, insofar as it refers to Section 32, Article 2, *supra,* is *dicta.* We do not believe such contention is correct.

This position was taken by the Supreme Court, as is evidenced by the language used by Judge Lester in a concurring opinion in the City of Okmulgee case, which appears in 282 Pac. 653, and is as follows:

> "It is contended by the defendants that the rights of the municipalities are limited in their privilege to grant franchises, and that this right may be withdrawn by the Legislature at its will and that acting under the sovereignty of the State and by virtue of Section 47, Article 9, which reads 'The Legislature shall have power to alter, amend, annul, revoke or repeal any charter of incorporation or franchise now existing and subject to be altered amended, annulled, revoked or repealed at the time of the adoption of this Constitution, or any that may be hereafter created. Whenever in its opinion it may be an injustice to the citizens of this State in such manner, how-

ever, that no injustice may be done to the incorporators' * * * the Legislature was acting within prescribed bounds in passing House Bill 4. *If the reader will turn to Section* 1, *Article* 9, *it will be discovered that the municipal corporations are excluded from the definitions of corporations or companies, and that Article* 9 *deals mainly with the creation of and the regulation of corporations and stock companies and it will be further observed that Section* 47, *Article* 9, *has reference to the primary charter or franchise of incorporation and has no reference to secondary franchises procured by corporations from the State, or municipalities.*"

This language clearly indicates that the Supreme Court had under consideration said Section 47 of Article 9, as applied to secondary franchises and specifically held that the same did not apply thereto, but that it was only the primary charter or franchise of a corporation which could be revoked, *et cetera,* under this provision of the Constitution.

This rule of law has been sustained by the Supreme Court of Oklahoma in the following cases:

*City of Okmulgee* v. *Okmulgee Gas Company,* 141 Okla. 98, 284 Pac. 70;

*City of Hugo* v. *Oklahoma Power Company,* 141 Okla. 100, 284 Pac. 12;

*City of Cushing* v. *Consolidated Gas Utilies Company,* 141 Okla. 82, 284 Pac. 38;

*In re Application of Consolidated Gas Utilities Company* for revocable permit under Chapter 102, Session Laws 1925, relative to the *Town of*

*Tonkawa, Oklahoma,* No. 20766, Supreme Court of Oklahoma (*not yet reported*).

These cases adopt the following rule of law announced in the case of *Cedar Rapids Water Company* v. *City of Cedar Rapids,* 118 Iowa 234, 91 N. W. 1081, to-wit

> "Grants of franchise in perpetuity or for unreasonable long periods of time are generally regarded as against public policy and, if ever valid, the authority therefor must be found in the Constitution and statutes of the State."

See also the following cases sustaining the views announced in said cases:

*Richmond County Gaslight Co.* v. *Town of Middleton,* 51 N. Y. 228;
*City of Brenham* v. *Brenham Water Co.,* 67 Tex. 542, 4 S. W. 143;
*Long* v. *City of Duluth,* 49 Minn. 280, 59 N. W. 913, 32 Am. St. Rep. 547,
*Thrift* v. *Elizabeth City,* 122 N. C. 31, 30 S. E. 349.

It, therefore, follows that the contentions of the respondents that the secondary franchises are perpetual cannot be sustained by any constitutional or statutory authority of the State of Oklahoma.

It is not contended by the petitioners herein that the secondary franchises granted to Carter and Halsell, as the trus-

tees of the Purcell-Lexington Toll Bridge Company, were void, but they contend that such franchises were granted to Carter and Halsell specifically for the Purcell-Lexington Toll Bridge Company, and that they as such trustees held the same for such Bridge Company. Such contention was sustained by the trial court.

We only desire to state that this contention is answered by the case of City of Okmulgee, etc., *supra.* This case cites Section 32, Article 2, of the Constitution of Oklahoma, which prohibits perpetuites and monopolies, and is as follows:

> "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State."

Such petition is further sustained by the Cedar Rapids case, *supra.*

The law is well established in the State of Oklahoma that at the expiration of the franchise to take tolls by a toll bridge company, or individuals, that the bridge property becomes the property of the State.

See case of *Grove Bridge Co., et al,* v. *State, ex rel. Hampton, et al,* 133 Okla. 115, 271 Pac. 846.

The first case announcing this rule is that of *State ex rel,*

*etc.*, v. *Lawrence Bridge Co.*, 22 Kan. 438. Mr. Justice Brewer, speaking for the court, at page 463 of said report, stated the law as follows:

> "For I agree with the Chief Justice that the bridge is a permanent structure on the public highway and under the authorities, when the franchise to take tolls ceases, the right of the public to use the bridge free from any burden of tolls attaches without any right on the part of the builders to remove the structure and destroy the highway. The right to take tolls for a specific number of years is the consideration granted by the public to the defendants for the privilege of placing this improvement on the highway, and the former owners have now no more right to remove the bridge than the owner of a turnpike to tear up after the franchise to take tolls has ceased."

This rule of law has been sustained in the following cases:

*Virginia Canon Toll Road Co.* v. *People*, 45 Pac. 398;
*State, ex rel*, v. *Scott County Road Co.*, 105 S. W. 752;
*Rockwith* v. *State Road and Bridge Co.* 108 N. W. 785;
*People, ex rel*, v. *Anderson and U. Valley Road Company*, 18 Pac. 308;
*Grand Rapids Bridge Co.* v. *Prange*, 35 Mich. 404.

There is not a decision of any court to the contrary.

Before presenting argument under Part 2, of this brief, we desire to call attention to the opinion of Judge Lewis of

the Supreme Court in which he states that under the provisions of Section 10,104, Compiled Oklahoma Statutes, 1921, it is indicated that the secondary franchises in the first instance may be issued to individuals. However, it will be observed by reading the same that such life may be enjoyed only by persons or corporations in the construction and operation of toll bridges over boundary lines between this and other states. Therefore, such statute is not a basis for the holding that the franchises in the instant case could legally be granted to individuals or that the same extended for a period in excess of the corporate life of the Purcell-Lexington Toll Bridge Company.

It is also stated in the opinion by Judge Lewis that Section 10,076, Compiled Oklahoma Statutes, 1921, authorizes the purchase or condemnation of the rights of persons and corporations in toll bridges. This statute was enacted in 1911 and authorizes the County Commissioners to acquire, either by purchase or condemnation, toll bridges and all rights and properties in connection therewith. This law was enacted before the enactment of Chapter 48, Session Laws, 1923-24, which classifies highways in the State of Oklahoma into three classes, to-wit: State highways, county highways and township roads. Under the provisions of said Chapter 48, *supra,* the State Highway Commission would be authorized to purchase a toll bridge on a State Highway where the rights of

said bridge company had not expired by limitation. The counties involved in this litigation could not purchase the same. The rights having expired as heretofore suggested, the State Highway Commission would have no authority to acquire the same as any funds paid therefor would constitute a gratuity and such is inhibited by Section 15 of Article 10 of the State Constitution.

**Part 2**

**This in an action against the State of Oklahoma and cannot be maintained without the State's consent granted by direct legislative enactment. Neither the executive nor judicial branch can waive the State's immunity from suit.**

There being no legislative enactments consenting for the State to be sued, its immunity from suit is thoroughly settled by Oklahoma decisions. Thus in *National Surety Co.* v. *State Banking Board*, 49 Okla. 184, 152 Pac. 389, Chief Justice Kane said:

> "It is a long established and well recognized principle of sovereignty that the State cannot be sued without its consent, granted by direct legislative enactment."

This rule of law has been established in the following cases:

> *State Banking Board* v. *Oklahoma Bankers Trust Company*, 63 Okla. 260, 145 Pac. 767;

*Lankford* v. *Schroeder*, 47 Okla. 279, 147 Pac. 1049;
*State Banking Board* v. *Oklahoma Bankers Trust Company*, 49 Okla. 72, 151 Pac. 586;
*Lankford* v. *Platt Iron Works Company*, 235 U. S. 461, 59 L. ed. 316;
*Love* v. *Filtsch*, 33 Okla. 131, 124 Pac. 30.

This rule of law has been established in other jurisdictions in the following cases:

*Eidenmiller* v. *State*, 233 N. W. 447;
*Hampton* v. *State Board of Education*, 42 A. L. R. 1456 (Fla.);
*Stanley* v. *Schwalby*, 162 U. S. 255, 40 L. ed. 976;
*McDowell* v. *Fuller*, 169 Mich. 332, 135 N. W. 267;
*Ayers* v. *Board of Trustees*, 98 So. 847-850;
*Mississippi Centennial Exposition Company* v. *Luderbach*, 123 Miss. 828, 86 So. 517;
*Morrah* v. *Dr. John De La Howe Industrial School*, 113 S. E. 70;
*Ex parte Ayers*, 123 U. S. 443, 31 L. ed. 216.

In *Hampton* v. *State Board of Education*, 42 A. L. R. 1456, the Florida Supreme Court said: "The Legislature is the proper body to authorize suits against the State."

In *Ayers* v. *Board of Trustees*, 98 So. 487, the Mississippi Supreme Court said: "Only the Legislature can surrender this privilege of the sovereign State and its governmental subdivisions or agencies."

In the case of *Mississippi Centennial Exposition Co.* v. *Luderbach, supra,* the Mississippi Supreme Court said, "It is final learning that the State and its subdivisions and agencies are not subject to suit unless made so by statute; and the statute, where a statute exists, is the measure of the power to sue such board or agency."

In *Morrah* v. *Dr. John De La Howe Industrial School,* 113 S. E. 70, the South Carolina Supreme Court said: "The State can be sued only by permission granted; that permission can be granted only by the general assembly; the effect of making the state a party would have been necessarily a judicial consent, upon the motion of the Attorney General, who has not the power to move for or consent to such suit."

In *Stanley* v. *Schwalby,* 162 U. S. 255, 40 L. ed. 960, quoted and followed by the Oklahoma Supreme Court in *National Surety Company* v. *State Banking Board, supra,* Mr. Justice Gray, speaking for a unanimous court, said: "It is a fundamental principle of public law, affirmed by a long series of decisions of this court, and clearly recognized in its former opinions in this case, that no suit can be maintained against the United States or against their property, in any court, without express authority of Congress * * *."

This brings on for consideration the following propositions:

**(a) The Oklahoma State Highway Commissioners are executive officers and exercising part of the executive powers of the State.**

Section 1 of Article 16 of the Oklahoma Constitution declares that "the Legislature is directed to establish a Department of Highways and shall have power to create improvement districts and provide for building and maintaining public roads and may provide for the utilization of convict and punitive labor thereon."

Pursuant to this constitutional mandate the present State Highway Commission was created by the provisions of Section 1, Chapter 68, Session Laws of 1929, and their statutory powers and duties are set forth in Chapter 48, Session Laws 1923-24, and Chapter 82, Session Laws 1927, as amended by the provisions of Chapter 245, Session Laws 1929. Paragraph (a) of Chapter 48, *supra,* provides:

> "(a) Have supervision of the highways and bridges which are constructed, improved or maintained in whole or in part by the aid of State monies and State highways constructed in whole or in part by the aid of monies appropriated by the United States Government, insofar as such supervision is consistent with the Acts of Congress relating thereto."

**(b) The State Highway Commission is an agency of the State and a part of the executive branch thereof.**

The Supreme Court of Oklahoma, in the case of *Wentz et al.* v. *Ingenthron et al.*, 146 Okla. 165, 294 Pac. 154, held that the State Highway Commission was a part of the executive branch of the government of the State of Oklahima, and that said court had no power or jurisdiction to interfere with the State Highway Commission as a part of the executive branch of the State government, so long as it acted within the law.

This principle of law was reaffirmed in the case of *Wentz* v. *Board of County Commissioners of Lincoln County, Oklahoma*, 147 Okla. 173, 295 Pac. 599.

The latest expressions of the Supreme Court of Oklahoma upon the rule announced in *Wentz* v. *Ingenthron, supra*, are found in the cases of *Wentz et al.* v. *Dawson et al.*, 149 Okla. 94, 299 Pac. 493, and *Hawks et al.* v. *Seay et al.*, 150 Okla. 160, 1 Pac. (2d) 148. All of the highway cases referred to herein, decided by the Supreme Court of Oklahoma, have held that the Highway Commission is an executive branch of the State of Oklahoma, and that it cannot be sued without specific legislative consent.

In the case of *Poindexter* v. *Greenhow*, 114 U. S. 270, 29 L. ed. 185, Justice Mathews said:

> "The State is a political corporate body and can act only through agents and can command only by laws."

In *Long* v. *Highway Commission of Iowa,* 213 N. W. 532, the Supreme Court of Iowa said:

> "The State Highway Commission, or agents of the State, acting for and in behalf of the State, within the powers conferred upon them by the statute. This action is an attempt by an injunction to control the manner in which the said agents of the State shall exercise the authority vested in them."

Obviously, the State can act only through its agents—that is, its officers and official representatives. The State is an intangible entity, a concept. See *Eidenmiller* v. *State, supra; Moehler* v. *Fish Commission of Oregon,* 276 Pac. 691.

**(c) The court will look through and beyond the nominal parties to this action and determine who is the real party in interest, and although the State is not specifically named party defendant, nevertheless, if it appears that the State is the real party in interest and will be affected by the judgment, the suit will be dismissed for want of an indispensable party.**

The first paragraph of the syllabus in *Salem Flouring Mills Co.* v. *Lord,* 42 Ore. 82, 69 Pac. 1033, says:

> "When the jurisdiction of the court is questioned on the ground that the action is really against the State, the court will look behind the nominal parties to the controversy, dismissing the action if it is really against the State, and retaining jurisdiction if not."

To the same effect see *State ex rel. Shafer* v. *Lowe,* 210 N. W. 501 (N. D.); *Hagood* v. *Southern et al.,* 117 U. S. 52 29 L. ed. 805; *Ex parte Ayers,* 123 U. S. 443, 31 L. ed. 216; 36 Cyc 915.

In *Love* v. *Filtsch,* 33 Okla. 131, 124 Pac. 30, the Oklahoma Supreme Court in a unanimous opinion holding that an action against officers of the State was in effect an action against the State although the State was not nominally a party, said:

> "While it is true that the State, in the case at bar, is not a party defendant as such, still, as was said by Justie Lamar in the case of *Pennoyer, et al,* v. *McConnaughy,* 140 U. S. 1, 35 L. ed. 363, it is well said that a suit against the officers of the State to compel them to do the acts which constitute a performance by it of its contracts is in effect, a suit against the State itself."

**(d) The Attorney General of Oklahoma is an executive officer of the State and the chief law officer thereof. It is his duty to represent the State Highway Commission in all legal proceedings.**

Section 1 of Article 6 of the Oklahoma Constitution declares that:

> "The executive authority of the State shall be vested in the Governor, Lieutenant Governor, Secretary of State, State Auditor, Attorney General, * * * , each of

whom shall keep his office and public records, books and papers at the seat of government, and shall perform such duties as may be designated in this Constitution, or prescribed by law."

Under the provisions of Section 8, Compiled Oklahoma Statutes 1921, it is the duty of the Attorney General to appear for the State and prosecute and defend all actions and proceedings in the Supreme Court and Criminal Court of Appeals in which the State shall be interested as a party, and shall also, when requested by the Governor, or either branch of the Legislature, appear for the State and prosecute or defend in any court or before any officer in any cause or matter, civil or criminal, in which the State may be a party or interested.

Under the provisions of Section 7, Chapter 18, Session Laws of Oklahoma 1923-24, it is the duty of the Attorney General, upon the direction of the Governor, or the request of the State Highway Commission, to act as legal advisor of the Commission and appear for and assist the Commission in any proceedings in any of the courts of the State in which the State is a party.

Since the Constitution of the State of Oklahoma provides that the Attorney General is an executive officer, we assume it will not be necessary for us to cite authorities to

this effect. Inasmuch as the statutes referred to prescribing the duties of the Attorney General in connection with the State Highway Commission are plain and unambiguous, we take it that such statutes are controlling.

**(c) The object of this suit is to preclude the individual members of the State Highway Commission of the State of Oklahoma, and the Attorney General thereof, from performing those duties specifically enjoined upon them as executive officers of the State of Oklahoma. It seeks to preclude them from enforcing a contract made and entered into by the State of Oklahoma and the Purcell-Lexington Toll Bridge Company. An action against such officers to prevent the discharge of their official duties is an action against the State and cannot be maintained.**

It has been directly and positively settled by the Supreme Court of the United States in three or four decisions in which it has laid down the rule that an action against the officers of the State to prevent them from doing things, operating as a breach of the State's contract, is an action against the State on the contract. Certainly, if an action may not be prosecuted against the State for a breach of its contract, it follows that no action could be brought against it from enforcing the provisions of contracts made with it and from enforcing the plain provisions of the statutes thereof.

The members of the State Highway Commission, and the Attorney General, in the event they should bring the suit suggested by the complainants in their bill, would only be act-

ing as officers of the State of Oklahoma representing such State in action, and although the State is not made a party to the present case, it is the real party against which relief is sought and in which a judgment for the complainants, although nominally against the defendants as individuals, would operate to control the action of the State, and is therefore, a suit against the State.

The Supreme Court of the United States in the case of *Ex parte Ayers, supra,* drew the distinction between actions permissible against officers of the State as individuals and actions against them where the result operates against the State instead of the individuals. The Court said:

> "The relief sought is against the defendants, not in their individual, but in their representative capacities as officers of the State of Virginia. The acts sought to be restrained are the bringing of the suits by the State of Virginia in its own name and for its own use. If the State had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing that such a suit could be maintained — it would have been subjected to the jurisdiction of the court by process served upon its Governor and Attorney General, according to the precedents in such cases. *New Jersey* v. *New York,* 30 U. S. 5 Pet. 284, 288. 290 (8:127, 128, 129); *Kentucky* v. *Dennison,* 65 U. S. 24 How. 66, 96, 97 (16:717, 725); Rule 5 of 1884, 108 U. S. 574 (see Bk. 20:901). If a decree could have been ren-

dered enjoining the State from bringing suit against its taxpayers, it would have *operated upon the State only through the officers who by law were required to represent it in bringing such suits,* viz, the present defendants, its Attorney General, and the Commonwealth's attorneys for the several counties. * * *

"The nature of the case as supposed is identical with that of the case as actually presented in the bill, with the single exception that the State is not named as a defendant. How else can the State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant * * *?

"The present case stands upon a footing altogether different. Admitting all that is claimed on the part of the complainants as to the breach of its contract on the part of the State of Virginia by the Acts of its General Assembly referred to in the bill of romplaint, there is nevertheless no foundation in law for the relief asked. For a breach of its contract by the State, it is conceded there is no remedy by suit against the State itself. This results from the 11th Amendment to the Constitution, which secures to the State immunity from suit by individual citizens of other states or aliens. *This immunity includes not only direct actions for damages for the breach of the contract brought against the State by name, but all other actions and suits against it, whether*

*in law or in equity. A bill in equity for the specific performance of the contract against the State by name, it is admitted, could not be brought.* In *Hagood* v. *Southern,* 117 U. S. 52 (29:805), it was decided that in such a bill, where the *State was not nominally a party* to the record, brought against its officers and agents, having no personal interest in the subject matter of the suit, and defending only as representing the State, where '*The things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State' the court was without jurisdiction, because it was a suit against a State.*

"The converse of that proposition must be equally true, because it is contained in it; that is, a bill, the object of which *is by injunction, indirectly, to compel the specific performance of the contract,* by forbidding all those acts and doings which constitute breaches of the contract, and must, also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, *through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract,* the suit is still, in substance, though not in form, a suit against the State. Such is the precise character of the suit in the circuit court against the petitioners in which the order was made, the violation of which constitutes the contempt for which they have been committed to the imprisonment from which they seek delivery by these writs.

"It may be asked what is the true ground of distinction, so far as the protection of the Constitution of

the United States is invoked, *between the contract rights of the complainant in such a suit, and other rights of person and of property?* In these latter cases it is said that jurisdiction may be exercised against individual defendants, notwithstanding the official character of their acts, while in cases of the former description the jurisdiction is denied.

"The distinction, however, is *obvious.* The acts alleged in the bill as threatened by the defendants, the present petitioners are violations of the assumed contract between the State of Virginia and the complainants, only as they are considered to be the acts of the State of Virginia. The defendants, as individuals, not being parties to that contract, are not capable in law of committing a breach of it. *There is no remedy for a breach of a contract, actual or apprehended,* except upon the contract itself, and between those who are by law parties to it. In a certain sense and in certain ways the Constitution of the United States protects contracts against laws of a State subsequently passed impairing their obligation, and this provision is recognized as extending to contracts between an individual and a State; but this, as is apparent, is subject to the other constitutional principle, of equal authority, contained in the 11th amendment, which secures to the State an immunity from suit. Wherever the question arises in a litigation between individuals, which does not involve a suit against a State, the contract will be judicially recognized as of binding force, notwithstanding any subsequent law of the State impairing its obligation. But this right is incidental to the judicial proceeding, in the course of which the question concerning it arises. It is not a

positive and substantive right of an absolute character, secured by the Constitution of the United States against every possible infraction, or for which redress is given as against strangers to the contract itself, for the injurious consequences of acts done or omitted by them. Accordingly, it was held in *Carter* v. *Greenhow*, 114 U. S. 317 (29:202), that no direct action for the denial of the right secured by a contract, other than upon the contract itself would lie under any provisions of the Statutes of the United States authorizing actions to redress the deprivation, under color of state law, of any right, privilege, or immunity secured by the Constitution of the United States. In that case it was said, page 322 (204); 'How, and in what sense, are these rights secured to him by the Constitution of the United States? The answer is, by the provision of Article I, Section 10, which forbids any State to pass laws impairing the obligation of contracts. That constitutional provision, so far as it can be said to confer upon or secure to any person any individual rights, does so only indirectly and incidentally. It forbids the passage by the States of laws such as are described. If any such are, nevertheless, passed by the Legislature of a State, they are unconstitutional and void. In any judicial proceeding necessary to vindicate his rights under a contract affected by such legislation, the individual has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution'. *But where the contract is between the individual and the State, no action will lie against the State,* and any action founded upon it *against defendants* who are officers of the State, the object of which is to enforce

its specific performance by *compelling those things to be done by the defendants which, when done, would constitute a performance by the State, or to forbid the doing of those things which, if done, would be merely breaches of the contracts by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution.*

"It cannot be doubted that the 11th amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of the obligation. *Louisiana* v. *New Orleans,* 102 U. S. 203 (26:132). That obligation, by virtue of the provision of Article I, Section 10, of the Constitution of the United States, cannot be impaired by any subsequent state legislation. Thus, not only the covenants and conditions of the contract are preserved but, also the substance of the original remedies for its enforcement. *It is different with contracts between individuals and a State.* In respect to these, by virtue of the 11th amendment to the Constitution, there being no remedy by a suit against the State, *the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion.* Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and *resume its original immunity* without any violation of the obligation of its contract in the constitutional sense.

*Beers* v. *Arkansas*, 61 U. S. 20 How. 52 (15:991); *Memphis & C. R. R. Co.* v. *Tennessee*, 101 U. S. 337 (25:960)."

A very interesting case upon what constitutes a suit against the State when brought against the individual officers thereof, is that of *Hampton* v. *State Board of Education*, 42 A. L. R. 1456, which states the exceptions to the rule that the State and its agencies are immune from suit. If there could be any doubt about this suit being an action against the State, it ought to be removed by the decision of the United States Supreme Court in *State Highway Commission of Wyoming* v. *Utah Construction Co.*, 278 U. S. 194, 73 L. ed. 262. That case involved an action against the Wyoming State Highway Commission. The Wyoming Highway Act originally provided that "the Commission shall have the power to sue in the name of the State Highway Commission of Wyoming, and may be sued by such name and in court upon any contract executed by it." Thus, the State had consented to be sued in the State courts, but the question was whether or not the suit against the Highway Commission could be maintained in the Federal court, and that turned on the question as to whether or not there was a diversity of citizenship. The original Act provided that the costs of roads should be paid from the State Highway fund and that the construction and maintenance of all State highways, "including bridges and culverts thereon, shall be per-

formed at the expense of the State and by and under the supervision of the Commission and State Highway Superintendent."

The action was for a breach of contract for the construction of a highway entered into between the Highway Commission, acting for the State, and the plaintiff. Plaintig filed an amended petition, naming the Wyoming State Highway Commission, and its individual members, as defendants, and sought to recover damages arising out of the breach of the construction contract as supplemental. The plaintiff's petition alleged that the plaintiff was a citizen of Utah and the Commission and its individual members were citizens of Wyoming. The Court held, however, that the suit was really against the State, *that the State was not a citizen,* and that there was no jurisdiction of the Federal court. The Court said:

> "It seems to us sufficiently clear that the suit is, in effect, against the State of Wyoming. The contract for the construction of the work in question was between the Utah Construction Company and the State. The State, acting through the Highway Commission, as it might through any officer, became a party to the original agreement and obligated herself thereby. Neither the Commission nor any of its members assumed any direct or personal responsibility. The Commission was but the arm or *alter ego* of the State, with no fund or ability to respond in damages."

The trial court did not pass upon that portion of the motion of the defendants, Hawks et al., as members of the State Highway Commission, and King, Attorney General, which urged dismissal on the ground that the suit was an attempt to sue the State of Oklahoma. If we are right in our contention that said action is a suit against the State, the motion on such ground involves the question of jurisdiction, and as we understand, such question may be raised at any time in the proceeding. We respectfully urge that under the Eleventh Amendment to the Constitution of the United States and the cases cited under the title of Point 1, in this brief, that the motion of the defendants, Hawks et al., as members of and constituting the State Highway Commission of the State of Oklahoma, should have been sustained by the trial court, and that this Court should now enter an order sustaining the same and dismiss this cause as to the defendants, Hawks et al., as members of the State Highway Commission, and King, Attorney General.

## CONCLUSION

In conclusion we most respectfully urge that the trial court properly held that the franchises to take toll on the Purcell-Lexington Toll Bridge had expired on the date of the trial of the case in the court below; and that the Boards of County Commissioners of McClain and Cleveland Counties, Oklahoma, could not grant toll franchises for more than twenty years under the provisions of Sections 5366 and 5367, Compiled Oklahoma Statutes, 1921; and that the grants to Carter, and others, were to them as trustees for the Purcell-Lexington Toll Bridge Company; that the bridge property involved had become the property of the State of Oklahoma and that the public was entitled to use the same without fee and that said court correctly dismissed the Bill of Complaint filed by the appellants.

It is further respectfully urged that the Honorable Circuit Court of Appeals erred in ordering and decreeing that the decree of the District Court for the Western District of Oklahoma be reversed with the direction that the injunction prayed for in the Bill be granted.

We also respectfully urge that the Circuit Court of Appeals erred in holding that said suit insofar as it pertains to the members of the Highway Commission and the Attorney General of Oklahoma, was not a suit against the State.

For the reasons herein assigned, we respectfully ask that this Honorable Court reverse the decision of the Honorable Circuit Court of Appeals and enter an order herein dismissing this cause as being one against the sovereign State of Oklahoma.

Respecfully submitted,

J. BERRY KING,
Attorney General of Oklahoma.

W. C. LEWIS,
Assistant Attorney General.

*Counsel for Petitioners*

# APPENDIX

## STATE STATUTES

TOLL BRIDGE CORPORATIONS

Section 5366, C. O. S., 1921:

"The term of existence of a bridge corporation shall not exceed twenty years, and in addition to the matters required by Section 5304 every corporation formed for the purpose of constructing a bridge over any steam of water must, in the articles of incorporation, specify as follows: The place where such bridge is to be built, over what stream; that the banks on both sides of the stream where such bridge is to be built are owned by such corporation, or that it has obtained in writing the consent of the owners of the banks, where the bridge is to be built to, build the bridge; or that the banks at such place are included within and part of a public highway, and in such case that the consent in writing of the Board of County Commissioners of the county or counties for the erection of such bridge by such corporation has been obtained, and it must file a certified copy of its articles of incorporation in the office of the register of deeds of the county or counties in which the bridge or any part thereof is situated or to be located; provided, that nothing in this section shall be construed for the purpose of erecting and maintaining bridges across boundary streams or streams between the State of Oklahoma and any other state or territory."

Section 5367, C. O. S., 1921:

"No such corporation shall construct or take tolls on a bridge until authority is granted therefor by the Board of County Commissioners of the county or counties in which it is to be located."'

Section 5368, C. O. S., 1921:

"Every such corporation also ceases to be a body corporate:

"First. If, within six months from the issue of its certificate by the Secretary of State, it has not obtained such authority from the Board or Boards of County Commissioners, as mentioned in the last section; and if, within one year thereafter, it has not commenced the onstruction of its bridge, and actually expended thereon at least ten per cent of its capital stock.

"Second. If, within three years from the issuing of its certificate of incorporation, the bridge be not completed."

Section 5369, C. O. S., 1921:

"Every bridge corporation must at all times keep the bridge in good and safe condition for travel both night and day unless it be rendered impassable by reason of floods or high water; and if it be destroyed by fire or other causes the corporation must rebuild within a period of one year from such destruction or its corporate rights shall be forfeited and cease to exist."

Section 5370, C, O. S., 1921:

"Such corporation, previous to receiving and as a precedent condition to the right to receive any toll upon the use of its bridge, must set up and keep in a conspicuous place on the bridge a board on which must be written, painted or printed, in a plain and legible manner, the rates of toll which shall have been prescribed by the Board of County Commissioners, and if such corporation shall demand or receive any greater rate of toll than the rate so prescribed, it shall be subject to a fine of ten dollars for each offense, to be recovered in an action by the party aggrieved or by any public officer making the complaint."

Section 5371, C. O. S., 1921:

"No such corporation shall demand or receive toll whenever said bridge is not in good and safe condition for use, and any person having paid toll on such bridge and finding the same in a bad or unsafe condition for loaded wagons or teams, shall have the right to make complaint before any justice of the peace in the county or counties in which the bridge is located, who shall thereupon summon the said corporation, through its toll-gatherer, officers or directors, to appear before him to answer the complaint, within not over five days from the date thereof and if upon the hearing it is found that the bridge is not in a good and safe condition for use, or is in a bad condition and unsafe for loaded wagons or teams, the justice of the peace must impose a fine not less than ten dollars nor more than fifty dollars upon such corporation, and he must thereupon also enter judgment and issue

his order that no toll be collected upon said bridge until it is put in good repair and safe condition."

Section 5372, C. O. S., 1921:

"Each toll-gatherer may prevent from passing through his gate all persons, animals or vehicles subject to toll until he shall have received, respectively, the tolls authorized to be collected; and if he wilfully and unreasonably hinder or delay any such person, animals or vehicles from passing, when the lawful toll has been paid or tendered, he shall forfeit and pay for each offense a sum not less than five dollars nor more than twenty-five dollars, to be recovered in an action by the party aggrieved."

Section 5373, C. O. S., 1921:

"Every person who forcibly, wilfully or fraudulently passes over any such bridge without having paid or tendered the legal toll for himself and the property in his charge, shall, for each offense, forfeit and pay to the corporation injured a sum not exceeding twenty-five dollars, to be recovered in an action in the name of such corporation."

Section 5374, C. O. S., 1921:

"The president and secretary of every bridge corporation must annually, within twenty days from the first day of January, report under oath to the Board of County Commissioners of the county in which the articles of incorporation are filed, specifying as follows: The cost of constructing and providing all necessary appendages and appurtenances of their bridge; the amount of all

moneys expended thereon, since its construction, for repairs and incidental expenses; the capital stock, how much paid in and how much actually expended thereon; the amount received during the year for tolls and from all other sources, stating each separately; the amount of dividends made; the indebtedness of the corporation; specifying for what it was incurred; the net amount of profits; and such other facts and particulars respecting the business of the corporation as the Board of County Commissioners may require."

Section 5375, C. O. S., 1921:

"Such corporation must cause the report required in the preceding section to be published for four weeks in a newspaper published in the town or city nearest such bridge. A failure to make such report and to publish it as aforesaid, subjects the corporation to a penalty of two hundred dollars; and for every week permitted to lapse after such failure, an additional penalty of fifty dollars, payable in each case to the county or counties from which the authority to construct and take tolls is derived, at the suit of such county or counties. All such cases must be reported by the Board of County Commissioners to the county attorney, who must commence an action therefor."

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WAGON ROAD CORPORATIONS.

Section 5625, C. O. S., 1921:

"Where a corporation is formed for the construction and maintenance of a wagon road, the road must be laid

out as follows: Three Commissioners must act in conjunction with the surveyor of the corporation, two to be appointed by the Board of Commissioners of the county through which the road is to run, and one by the corporation, who must lay out one proposed road and report their proceedings, together with the map of the road, to the Board of Commissioners of the county as provided in the succeeding section."

Section 5626, C. O. S., 1921:

"When the route is surveyed a map thereof must be submitted to and filed with the Board of Commissioners of each county through or into which the road runs, giving its general course, and the principal points to or by which it runs, and its width, which must in no case exceed one hundred feet, and the Board of County Commissioners must either approve or reject the survey. If approved, it must be entered of recorr on the journal of the Board, and such approval authorizes the use of all public lands and highways over which the survey runs; but the Board of County Commissioners must require the corporation at its own expense so to change and open the highways so taken and used as to make the same as good as they were before the appropriation thereof; and the corporation must so construct all crossings of public highways over and by its road and its toll-gates as not to hinder or obstruct the use of the same."

Section 5627, C. O. S., 1921:

"All wagon road corporations may bridge or keep ferries on streams on the line of their road, and must do all things necessary to keep the same in repair. They may

take such tolls only on their roads, ferries or bridges as are fixed by the Board of County Commissioners of the proper county through which the road passes, or in which the ferry or bridge is situated; but in no case must the tolls be more than sufficient to pay fifteen per cent per annum on the cost of construction, after paying for repairs and other expenses for attending to the roads, bridges and ferries. If tolls, other than as herein provided, are charges or demanded, the corporation shall forfeit its franchise and must pay to the party so charged one hundred dollars as liquidated damages."

Section 5628, C. O. S., 1921:

"When any highway or public road is taken and used by any wagon road corporation as a part of its road, the corporation must not place a toll-gate on or take tolls for the use of such highway or public road by teamsters, travelers, drovers or any one transporting property over the same."

Section 5629, C. O. S., 1921:

"The corporation must affix and keep up, at or over each gate or in some conspicious place, so as to be conveniently read, a printed list of the rates of toll levied and demanded."

Section 5630, C. O. S., 1921:

"Each toll gatherer may prevent from passing through his gates persons leading or driving animals or vehicles subject to toll, until they shall have paid, respectively, the tolls authorized to be collected.

Section 5631, C. O. S., 1921:

"Every toll-gatherer who, at any gate, unreasonably hinders or delays any traveler or passenger liable to the payment of toll, or demands or receives from any person more than he is authorized to collect, shall for each offense forfeit the sum of twenty-five dollars to the person aggrieved."

Section 5632, C. O. S., 1921:

"Every person who, to avoid the payment of the legal toll, with his team, vehicle or horse turns out of a wagon, turnpike, or plank road, or passes any gate thereon on the ground adjacent thereto, and again enters upon such road, for each offense shall forfeit the sum of five dollars to the corporation injured."

Section 5633, C. O. S., 1921:

"Every person who:

"First. Wilfully breaks, cuts down, defaces or injures any mile-stone or post on any wagon, turnpike or plank road; or,

"Second. Wilfully breaks, or throws down any gate on such road; or,

"Third. Digs up or injures any part of such road, or anything thereunto belonging; or,

"Fourth. Forcibly or fraudulently passes any gate thereon without having paid the legal toll;

"For each offense shall forfeit to the corporation injured the sum of twenty-five dollars, in addition to the damages resulting from his wrongful act."

Section 5634, C. O. S., 1921:

"The entire revenue from the road shall be appropriated:

"First. To repayment to the corporation of the costs of its construction, together with the incidental expenses incurred in collecting tolls and keeping the road in repair; and,

"Second. To the payment of the dividend among its stockholders as provided in Section 5627. When the payment of the cost of construction is completed, the tolls must be so reduced as to raise no more than an amount sufficient to pay a dividend of twelve per cent per annum and incidental expenses and to keep the road in good repair."

Section 5635, C. O. S., 1921:

"The corporation may mortgage or hypothecate its road and other property for funds with which to construct or repair their road but no mortgage or hypothecation is valid or binding unless the capital stock subscribed has been paid in and at least twenty-five per cent invested in the construction of the road and appurtenances, and then only after an affirmative vote of two-thirds of the capital stock subscribed."

Section 5636, C. O. S., 1921:

"When a wagon, turnpike or plank road is constructed, owned or operated by any natural person, this article is applicable to such person in like manner as it is applicable to corporations."

STATE ACQUISITION OF TOLL BRIDGES AND TOLL ROADS.

Section 1, Chapter 256, Session Laws, 1929:

"The State Highway Commission is hereby authorized and empowered to acquire for and on behalf of the State by purchase or condemnation proceedings, gift or grant, any toll bridge or bridges and any toll road, a part of which is a toll or privately owned bridge and all property used or needed in connection therewith, located on or serving any road or part of road, constituting a part of the State Highway System. Such power shall also extend to include any toll bridge or other privately owned bridge located on or serving any State Highway, which highway is connected by said bridge with a public highway in an adjoining state. The State Highway Commission is also granted the full power and authority to construct for and on behalf of the State free bridges over and across any stream within the State or any stream between this and an adjoining state, when such bridges will connect a State Highway or a State Highway within this State and a public highway within an adjoining state."

Section 12, Chapter 256, Session Laws, 1929:

"When any bridge is acquired under the provisions of this Act, the compensation therefor, including the franchise rights, shall be limited to not exceed the sum of (1) the actual cost of replacement of such bridge and its approaches, less reasonable deduction for actual depreciation in value; (2) the actual cost in securing such interest in real estate as was necessary for its construction; (3) the actual financing and promotion costs, not to exceed

ten per cent (10%) of the cost of the construction of the bridge and its approaches; and (4) the actual expenditures for necessary betterments and improvements."

---

TOLL BRIDGE CORPORATIONS.

Section 1, Chapter 257, Session Laws, 1929:

"No toll bridge corporation now or hereafter organized or existing under the laws of Oklahoma, shall be allowed to reorganize or reincorporate in any manner, having for its purpose the extension of the period of corporate existence of such corporation beyond the primary or original period of corporate existence specified by law, and no charter heretofore or hereafter issued to such corporation shall be extended in any manner or for any purpose beyond the original period of existence allowed by law; nor shall any franchise heretofore or hereafter granted any such corporation, having for its purpose the authorization to collect tolls, be in any manner or for any purpose extended, renewed or reissued over or beyond the period of the original grant as provided by law."

---

COUNTY COMMISSIONERS AUTHORIZED TO PURCHASE TOLL BRIDGE.

Section 10,076, C. O. S., 1921:

"The Board of County Commissioners of any county of the State of Oklahoma is hereby authorized and empowered to acquire by purchase, by agreement with the

owner or owners thereof, and by condemnation proceedings where agreement cannot be had, for the use of the public, all the rights and properties of whatsoever character, of any person, firm or corporation, used for and in the operation of any toll-bridge in said county."

---

SECONDARY FRANCHISE.

*Exhibit A*

State of Oklahoma, County of McClain. *ss.*

The Board of County Commissioners of McClain County, State of Oklahoma, met in special session on the 22nd day of April, 1911, pursuant to the call of the County Clerk as follows:

I, C. W. Hoggard, County Clerk of McClain County, Oklahoma, hereby call a meeting of the County Commissioners of McClain County, to meet at the County Seat, Saturday, April 22nd, 1911, at one o'clock P. M., for the purpose of acting upon an application of Dorset Carter and Tom Halsell, for authority and permission to construct, erect and maintain a toll bridge across the South Canadian River at or near Purcell, Oklahoma.
Dated this 17th day of April, 1911.

C. W. HOGGARD,
County Clerk of McClain County.

At which time there were present, L. L. Hawk, chairman, G. Watt Morris, member, and C. W. Hoggard, county clerk, and the following business transacted, to-wit:

The matter of acting upon the application of Dorset Carter and Tom Halsell, for authority and permission to construct, erect and maintain a Toll Bridge across the South Canadian River at or near Purcell, Oklahoma, coming on for consideration, the following resolution is by the Board adopted:

Be it Resolved by the Board of County Commissioners of McClain County, Oklahoma, that, the right, authority and privilege to construct, erect, maintain and operate a toll bridge and collect tolls thereon across the South Canadian River, be and the same is hereby granted unto Dorset Carter and Tom Halsell, or their assigns, of Purcell, Oklahoma. Said bridge to be erected within the time, as provided by law, or else this authority be null and void.

Section 2. Said bridge shall be constructed across the South Canadian River, beginning at or near a point in the City of Purcell where the East end of Jefferson Street intersects with the South Canadian River, not exceeding 1,000 feet North or South thereof, and said bridge to extend across the said river in a general Easterly direction.

Section 3. That the tolls to be collected by the said grantees or assigns, shall be as follows: Private conveyance,

Each vehicle, not exceeding two occupants..25c each way
Each additional passenger ..... 5c each way
Horse and rider .....10c each way
Footman ..... 5c each way

*Public Conveyance.*

Passenger vehicle and driver .....$50.00 per annum
Each additional passenger ..... 5c each way
Freight vehicles and driver ..... 25.00 per annum
The tolls above enumerated shall not be increased by the Bridge Company except as is now and may be hereafter legally provided; but may be reduced by said Bridge Company upon the posting by them of proper notice as is provided by law.

Section 4. That the grants herein made shall be perpetual, subject only to such limitations as is by law now or may be hereinafter provided.

Section 5. Nothing herein contained shall be construed as giving to the said grantees, or their assigns, the exclusive right to construct and operate a Toll Bridge over and across said stream, but the power is expressly herein reserved by the said Board of County Commissioners to make other and similar grants to other parties, firms or corporations, as in its judgment, it may deem expedient.

Section 6. That the grantees may transfer all its rights and privileges herein granted unto any individual or corporation organized under the laws of the State of Oklahoma and the said conveyance by the said grantees vest unto such individuals or corporations all the rights and privileges and concessions herein made and granted, as though such rights, privileges and grants had been made direct to such corporations, provided, however, when the said grantees herein do convey or assign their rights and privileges as herein granted, that the instrument conveying the same to be filed or recorded in the of-

fice of the Register of Deeds of McClain County. Ordered that the Board is adjourned.

Approved:

L L.. Hawk, *Chairman.*

Attest:

C. W. Hoggard, County Clerk.

*Exhibit B.*

In the Matter of Toll Bridge, *ss.*

Be it resolved by the Board of County Commissioners of Cleveland County, that the right, authority and the privilege to construct, erect, maintain and operate a toll bridge and to collect tolls thereon, across the South Canadian River be, and the same is hereby granted unto Dorset Carter and Tom Halsell, or their assigns, of Purcell, Oklahoma. Said bridge to be erected within the time as provided by law, otherwise this authority will be null and void.

Section 2. Said bridge shall be erected across said South Canadian River, beginning at or near a point where the public highway, located on the section line between Sections Six (6) and Seven (7), Township Six (6) North, Range One (1) West, intersects the East bank of the South Canadian River, in Cleveland County and State of Oklahoma, and on the North part of said public highway, and said bridge shall extend in a general Westerly direction across the South Canadian River to a point at or near the intersection of Jefferson Street in the City of Purcell, State of Oklahoma. And so much of said public highway situated on the section line between Sections Six (6) and Seven (7) Township Six (6) North,

Range One (1) West, not exceeding twenty feet in width and one thousand feet in length, is hereby granted to the said Dorset Carter and Tom Halsell for the purpose of the construction and erection and operation of said bridge and approaches thereto .

Section 3. That the tolls to be collected by said grantees, or assigns, shall be as follows:

*Private Conveyances.*

Each vehicle, not exceeding two occupants 25c each way
Each additional passenger ..... 5c each way
Horse and rider .....10c each way
Footman ..... 5c each way

*Public Conveyance.*

Passenger vehicle and driver .....$50.00 per annum
Freight vehicle and driver ..... 25.00 per annum
Each passenger ..... 5c each way

The tolls above enumerated shall not be increased by the Bridge Company except as is now, or may hereafter be legally provided, but may be reduced by said Bridge Company upon the posting by them of proper notices as is provided by law.

Section 4. That the grants herein made shall be perpetual, subject only to such limitations as is by law or may hereafter be provided.

Section 5. Nothing herein contained shall be construed as giving to the said grantees, or their assigns, the exclusive right to construct and operate a Toll Bridge over, and across said stream, but the power is expressly herein reserved by the Board of County Commissioners to make other and similar grants to other parties, firms

or corporations, as in its judgment it may deem expedient.

Section 6. That the grantees may transfer all the rights and privileges herein granted unto any individual or corporation, organized under the laws of the State of Oklahoma, and the said conveyance by said grantees shall vest unto such individual or corporation all the rights and privileges and concessions herein made and granted, as though such rights, privileges and grants had been made direct to such corporation, provided, however, when the said grantees herein do convey or assign their rights and privileges as herein granted, that the instrument conveying the same be filed in the office of the Register of Deeds of Cleveland County.

ATTEST:

(SEAL)

J. A. Fox, Chairman,
Board of County Commissioners,

State of Oklahoma, Cleveland County, *ss.*

I, E. B. Helms, County Clerk of the aforesaid County and state do hereby certify that the above and foregoing is a true and correct copy of part of the Commissioners' Proceedings of May 16th, 1911.

In testimony whereof I set my hand and official seal this 27th day of June, 1928.

(SEAL) E. B. HELMS, County Clerk.

FILE COPY

Office Supreme Court, U. S.
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JUL 19 1932
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

SAM HAWKS, J. F. McKEEL and LEW WENTZ, constituting the State Highway Commission of Oklahoma; J. BERRY KING, Attorney General of Oklahoma; PURMAN WILSON, County Attorney of McClain County, Oklahoma; PERSON WOODALL, County Attorney of Cleveland County, Oklahoma; and J. R. EVATT, A. O. MADDOX, J. E. COLBERT, J. C. TODD, GEORGE CARPENTER, and GEORGE N. CHURCH,

*Petitioners,*

vs.

CHARLES H. HAMILL and WILLOUGHBY G. WALLING,

*Respondents.*

No. 147

## BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

CHARLES B. COCHRAN,
*Attorney for Respondents*

AMES, COCHRAN, AMES & MONNET,
*of Counsel.*

Francis & Holden, Brief Printers, 523-5 West Second St., Oklahoma City. Phone 2-6245

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*Petitioners,*

vs.

CHARLES H. HAMILL and WILLOUGHBY G. WALLING,

*Respondents.*

No. 147

## BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

### STATEMENT OF THE CASE.

A complete and accurate statement of the case is contained in the opinion of the Circuit Court (R. 81-84).

The complete opinion of the Circuit Court is found in the printed transcript filed herein at pages 81-94, and is reported in 58 Fed. (2d) 41.

The substance of the holding of the Circuit Court of Appeals is as follows:

1. The franchises owned by the complainants were not limited in duration to the life or lives of the first takers, whether corporate or individual.

2. The franchises were by their terms perpetual, subject, however, to the general laws of the State of Oklahoma, which authorized the Legislature of the State to annul the franchises and the Counties to acquire, by purchase or condemnation, the rights of persons or corporations in toll bridges. Such franchises were not violative of Section 32, Art. II, Oklahoma Constitution.

3. The suit is not one against the State of Oklahoma.

The petitioner is contending:

First: That the decision of the Circuit Court of Appeals on the first two propositions is in conflict with the decisions of the Supreme Court of Oklahoma.

Second: That the decision on the last proposition is not in accord with the applicable decisions of this Court.

## ARGUMENT.

**The secondary franchises were granted to individuals, and the duration of such franchises was not limited to the life of the corporation to which such franchises were assigned.**

The franchises to construct, erect and maintain a toll bridge across the South Canadian River were granted to Dorset Carter and Tom Halsell and their assigns in the year 1911 (R. 13-17). These franchises were assigned to Purcell-Lexington Toll Bridge Company on December 6, 1911. The Circuit Court concluded that "these franchises being perpetual and assignable, extended beyond the life or lives of the first takers, whether corporate or individual, according to the settled rules" (R. 91). The bill of complaint very clearly alleged that the franchises were granted to individuals, to wit, Halsell and Carter, and their assigns. The original franchises having been granted to individuals, their existence and duration are wholly independent of the corporate existence and duration of the corporations to which said franchises were assigned.

*Grove Bridge Co.* v. *State*, 133 Okla. 115, 271 Pac. 846;
*Postal Bridge Company* v. *State*, 139 Okla. 225, 282 Pac. 462.

If it should be conceded that the secondary franchises were granted to Halsell and Carter for the use and benefit of a corporation to be thereafter organized, such secondary

The substance of the holding of the Circuit Court of Appeals is as follows:

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2. The franchises were by their terms perpetual, subject, however, to the general laws of the State of Oklahoma, which authorized the Legislature of the State to annul the franchises and the Counties to acquire, by purchase or condemnation, the rights of persons or corporations in toll bridges. Such franchises were not violative of Section 32, Art. II, Oklahoma Constitution.

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*Grove Bridge Co.* v. *State*, 133 Okla. 115, 271 Pac. 846;
*Postal Bridge Company* v. *State*, 139 Okla. 225, 282 Pac. 462.

If it should be conceded that the secondary franchises were granted to Halsell and Carter for the use and benefit of a corporation to be thereafter organized, such secondary

franchises were not limited in duration to the corporate life of such toll bridge corporation.

*City of Owensboro* v. *Cumberland Telephone & Telegraph Company*, 230 U. S. 58;
*Detroit* v. *Detroit Street Railway Company*, 184 U. S. 395;
*City of Louisville* v. *Cumberland Telephone Company*, 224 U. S. 649;
*Old Colony Trust Co.* v. *Omaha*, 230 U. S. 101, 112;
*City and County of Denver* v. *Denver Tramway Corporation*, 23 Fed. (2d) 287, 299, 300; certiorari denied, 278 U. S. 616;
*State* v. *Des Moines City Ry. Co.*, 159 Ia. 259, 140 N. W. 437;
*Grand Rapids Bridge Co.* v. *Prange*, 35 Mich. 400.

It is contended by the petitioner that the decision of the Circuit Court of Appeals on this proposition is in conflict with local decisions, but the only case cited in support of that contention is *Grove Bridge Co.* v. *State*, 133 Okla. 115, 271 Pac. 846. The following pertinent language from that case squarely supports the decision of the Circuit Court:

> "The original franchise herein having been granted to the individuals, therefore its existence is wholly independent of, and is neither connected with, nor influenced by, the corporate existence of the Grove Bridge Company, to whom the franchise was assigned by the original grantees." (271 Pac. 848.)

**The general laws of Oklahoma which were in force when the franchises were granted became a part of the franchises.**

*Pioneer Telephone & Telegraph Company* v. *State*, 38 Okla. 554, 134 Pac. 398;
*Oklahoma City* v. *Shields*, 22 Okla. 265, 100 Pac. 559;
*Noble State Bank* v. *Haskell*, 22 Okla. 48, 97 Pac. 590;
*Citizens Savings Bank* v. *Owensboro*, 173 U. S. 636, 644;
*Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 345;
*Greenwood* v. *Freight Company*, 105 U. S. 13, 20.

At the time the franchises herein involved were granted, the following general laws of Oklahoma were in force and became a part of such franchises, to wit:

Section 47 of Article IX of the Constitution, which is as follows:

> "The Legislature shall have power to alter, amend, annul, revoke, or repeal any charter of incorporation or franchise now existing and subject to be altered, amended, revoked, or repealed at the time of the adoption of this Constitution, or any that may be hereafter created, whenever in its opinion it may be injurious to the citizens of this State, in such manner, however, that no injustice shall be done to the incorporators."

Section 10,076, Compiled Oklahoma Statutes 1921, which is as follows:

> "The board of county commissioners of any county of the State of Oklahoma is hereby authorized and empowered to acquire by purchase, by agreement with the owner or owners thereof, and by condemnation proceedings where agreement cannot be had, for the use of the

public, all the rights and properties of whatsoever character, of any person, firm or corporation, used for and in the operation of any toll-bridges in said county."

**As the franchises were subject to repeal by the Legislature, and subject to termination at any time by purchase or condemnation, they were not void for perpetuity or irrevocableness.**

The franchises were to continue until such time as the Legislature should repeal them, or until such time as the counties should elect to acquire the toll bridge property by purchase or condemnation. As it was within the power of the State or the counties to terminate these franchises at any time, they cannot be considered void for perpetuity.

> *City of Seattle* v. *Columbia, etc.* (Wash.), 33 Pac. 1048.

The Circuit Court of Appeals accordingly concluded that the franchises were not violative of Section 32 of Article II of the Constitution of Oklahoma, which is as follows:

> "Perpetuities and monopolies are contrary to the genius of free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State."

**The opinion is not in conflict with City of Okmulgee vs. Okmulgee Gas Company and similar cases.**

The petitioners contend that the decision of the Circuit Court is in conflict with *City of Okmulgee* v. *Okmulgee Gas Company*, 140 Okla. 88, 282 Pac. 640, and similar cases cited at page 12 of the petition for writ of certiorari.

In the opinion of the Circuit Court it was stated that "we do not doubt that the word 'perpetuities' in said section was not intended to mean or to be equivalent to perpetual franchises, but was intended to limit the power to pass titles that would vest *in futuro*. It was so applied by the Supreme Court of Oklahoma in *McLaughlin* v. *Yingling;* 213 Pac. 552, and *In re Street's Estate,* 280 Pac. 413; 48 C. J. 929; Kent's Commentaries on American Law, Vol. 4, p. 267."

The above statement is in harmony with the holding of this Court in *Perrin* v. *Corey,* 24 How. 231, 235.

However, the Circuit Court proceeded a step further and concluded that the franchises under consideration should not be considered perpetuities, even though a perpetuity should be held to mean a thing having a perpetual duration. The following is the language of the opinion in that particular (R. 94):

> "Section 47 of Article IX does, however, provide that the Legislature may annul charters or franchises in such manner that no injustice shall be done to the incorporators. Also, Section 10,076 of the State Statutes authorizes the purchase or condemnation of rights of persons or corporations in toll bridges."

In *City of Okmulgee* v. *Okmulgee Gas Company, supra,* and the other cases cited by petitioner, the court had under consideration franchises for the furnishing of power, light, heat, gas, electricity, or water as a public utility in any

city or town of this State. Such franchises were granted by cities and towns under and subject to the provisions of Sections 5 (a) and 5 (b) of Article XVIII of the Oklahoma Constitution. It is not contended that the franchises involved in this case were issued under, or subject to, those provisions of the Constitution. The statement relative to perpetuities, in the Okmulgee case, must be construed in connection with the principal conclusion running throughout the opinion, to wit, that Sections 5 (a) and 5 (b) of Article XVIII provide how a municipal franchise may be created, extended or renewed, and limit the period to 25 years, and as those sections of the Constitution vested that power in the municipalities, such power could not be exercised by the Legislature, and as the provisions of the act which was under consideration attempted to take away from the municipalities the power to alter, amend, or repeal a franchise, and attempted to deprive the municipalities of the power to limit the duration to 25 years, such act, as far as the municipalities were concerned, would create a franchise of perpetual duration, as the only authority to repeal was in the Legislature. In other words, the power of altering, renewing and extending such franchises, which the Constitution had vested in the municipalities, and limited to a peroid of 25 years, the Legislature had attempted to usurp, with the result that a municipality which had granted a franchise under authority of the Constitution,

was powerless to control its termination, renewal or extension. The pertinent language of the Oklahoma court in that particular is found in *City of Okmulgee* v. *Okmulgee Gas Company,* 282 Pac. 640, at page 649, as follows:

> "This section is very similar to the provisions of Section 47 of Article 9, but there is a material difference in the language employed in Sections 5 (a) and 5 (b) of Article 18, and the language employed in Section 47 of Article 9, and of Section 4 of House Bill No. 4. By Sections 5 (a) and 5 (b) of Article 18, *supra,* it is provided how a charter may be granted, extended, or renewed, and limits the period for which it may be granted, and the period to which it may be extended or renewed to 25 years. Under House Bill No. 4, the revocable permit is simply a perpetual franchise which may be altered, amended, annulled, or revoked by the Legislature of Oklahoma only whenever in its opinion such franchises may be injurious to the citizens of the State.
>
> "Further, the municipality is deprived by House Bill No. 4 of renewing or extending a franchise and the qualified electors of a municipality equal to 25 percentum of the total number of votes cast at the next preceding general municipal election are deprived of their right of demanding that a franchise be granted, extended, or renewed, and the qualified electors by a majority vote thereof are deprived of the right of expressing their opinion as to whether or not the franchise should be granted, extended, or renewed, and, if a majority should vote in favor thereof, the proper authorities of the municipality cannot perform the ministerial duty which this court has held was enjoined upon them by the Constitution."

In the matter of toll bridge franchises, there are no constitutional provisions similar to Sections 5 (a) and 5 (b) of Article XVIII, and the Legislature has full power to

alter, repeal or modify such franchises under Section 47 of Article IX of the Constitution, and the counties have full power to terminate such franchises by purchase or condemnation of the property. The decision of the Circuit Court of Appeals, therefore, is not in conflict with the above opinion.

**State Court decisions, construing State constitutional provisions after contracts had been entered into and rights had accrued thereon, are not binding on Federal courts, and Federal courts assert the right to adopt their own interpretation of the law applicable to the case.**

*Pease* v. *Peck*, 18 How. 595;
*Thompson* v. *Perrine*, 103 U. S. 806;
*Burgess* v. *Seligman*, 107 U. S. 20;
*Folsom* v. *Township*, 159 U. S. 611;
*Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349;
*Moore-Mansfield Construction Co.* v. *Electrical Installation Company*, 234 U. S. 619;
*Enfield* v. *Jordan*, 119 U. S. 680;
*Bolles* v. *Brimfield*, 120 U. S. 759;
*Barnum* v. *Okolona*, 148 U. S. 393;
*Motherscad, Bank Commissioner of Oklahoma*, v. *U. S. F. & G. Co.*, 22 Fed. (2d) 644;
*City and County of Denver* v. *Denver Tramway Corporation*, 23 Fed. (2d) 287; certiorai denied 278 U. S. 616.

The franchises were granted in 1911 (R. 4-5). At that time Section 32 of Article II of the Oklahoma Constitution prohibited perpetuities, but there was no definition of the word "perpetuities" contained in such constitutional provision, and it was necessary to look to the general law for

such definition. There was no decision of the Supreme Court of Oklahoma on the subject until the decision in *McLauglin* v. *Yingling, supra,* decided in 1923, and the common-law definition was adopted in that case. The decision in *City of Okmulgee* v. *Okmulgee Gas Company* was rendered in 1929.

If the decision of the Circuit Court should be considered in conflict with the Oklahoma decisions cited by the petitioners, the Circuit Court's opinion is in conformity with the settled law as the same existed at the time the rights accrued under the franchise, and it was not error for that court to decline to follow such decisions of the Supreme Court of Oklahoma which were decided eighteen years after the rights had accrued under the franchises.

**The suit is not against the State of Oklahoma.**

*Reagan* v. *Farmers Loan & Trust Company,* 154 U. S. 362, 390;
*Old Colony Trust Co.* v. *City of Seattle,* 271 U. S. 426;
*Missouri, Kansas & Texas Ry. Co.* v. *Missouri Railroad & Warehouse Commissioners,* 183 U. S. 53, 59;
*Ex parte Young,* 209 U. S. 123;
*Prout* v. *Starr,* 188 U. S. 537;
*Osborne* v. *Bank of U. S.,* 9 Wheat. 738;
*Allen* v. *B. & O. R. R. Co.,* 114 U. S. 311;
*Poindexter* v. *Greenhow,* 114 U. S. 270;
*Weiland* v. *Pioneer Irr. Co.,* 238 Fed. 519;
*McGruder* v. *Belle Fourche Valley Water Users Association,* 219 Fed. 72;

*Strain* v. *U. S. F. & G. Co.*, 292 Fed. 694;
*Cline* v. *Frink Dairy Co.*, 274 U. S. 445.

Respectfully submitted,

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# Supreme Court of the United States

## OCTOBER TERM, 1932.

SAM HAWKS, J. F. McKEEL and LEW WENTZ Constituting the State Highway Commission of Oklahoma; J. BERRY KING, Attorney General of Oklahoma; PURMAN WILSON, County Attorney of McClain County, Oklahoma; PERSON WOODALL, County Attorney of Cleveland County, Oklahoma; and J. R. EVATT, A. O. MADDOX, J. E. COLBERT, J. C. TODD, GEORGE CARPENTER and GEORGE N. CHURCH,

*Petitioners,*

vs.

CHARLES H. HAMILL and WILLOUGHBY G. WALLING,

*Respondents.*

No. 147

## BRIEF OF RESPONDENTS

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# Supreme Court of the United States

## OCTOBER TERM, 1932.

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SAM HAWKS, J. F. McKEEL and LEW WENTZ Constituting the State Highway Commission of Oklahoma; J. BERRY KING, Attorney General of Oklahoma; PURMAN WILSON, County Attorney of McClain County, Oklahoma; PERSON WOODALL, County Attorney of Cleveland County, Oklahoma; and J. R. EVATT, A. O. MADDOX, J. E. COLBERT, J. C. TODD, GEORGE CARPENTER and GEORGE N. CHURCH,

*Petitioners,*

vs.

CHARLES H. HAMILL and WILLOUGHBY G. WALLING,

*Respondents.*

No. 147

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## BRIEF OF RESPONDENTS

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### STATEMENT OF THE CASE

Respondents, citizens and residents of Illinois, brought this suit to obtain protection by writ of injunction against the petitioners, and all citizens of the State of Oklahoma using the Purcell-Lexington toll bridge, interfering with the respondents in the operation of said toll bridge and in the col-

lection of tolls from persons using said toll bridge, and using said bridge without the payment of tolls.

The bridge crosses the South Canadian River at Purcell, Oklahoma. The river is the dividing line between McClain and Cleveland Counties. The bridge was constructed under franchises to operate the same as a toll bridge, granted by those counties to Dorset Carter and Tom Halsell on April 22, 1911, and May 16, 1911. Each franchise provided:

"That the grants herein made shall be perpetual and subject only to such limitations as is by law now, or may be hereafter provided,"

and also contained a provision that the same might be transferred to any individual, or corporation organized under the laws of the State of Oklahoma. On May 18, 1911, Purcell-Lexington Toll Bridge Company was incorporated under the laws of Oklahoma, and the franchises were thereafter assigned to that corporation. The corporation completed the bridge and operated it until April 2, 1931, when the bridge and franchises were assigned to Walling, Hamill and Carter. Prior to the filing of the suit, Carter conveyed his interest to Hamill and Walling. The complaint named as defendants the three members of the Highway Commission of Oklahoma, the Attorney General, the County Attorneys of the two counties, and six individuals, three of whom resided in McClain County and three in Cleveland County. The six individual

defendants were alleged to be representative of the citizens of the State of Oklahoma who have occasion to and will use said bridge, and that said defendants and other citizens of the State of Oklahoma having occasion to use said bridge, will, unless enjoined, use the same without the payment of tolls, and that complainants would be compelled to resort to force to prevent the unlawful use of the bridge, or would be compelled to prosecute a multiplicity of suits for that purpose; that the citizens of the State who use and will continue to use said bridge are so numerous that it is impossible to make all of them parties.

The bill of complaint alleged that the defendants and each of them, were contending that the right to operate said toll bridge and to collect tolls from persons using the same would terminate with the corporate existence of the Purcell-Lexington Toll Bridge Company on the 18th day of May, 1931, and that said bridge would at that time become a free bridge and a part of the State Highway system of the State of Oklahoma, with the right and privilege of citizens of the State of Oklahoma to use the same as a public highway without the payment of tolls; that the franchises to operate the bridge were granted to individuals and not to the corporation, and such franchises continue in full force and effect in accordance with their terms; that the right to continue in possession and operation of the bridge and take tolls was in the complain-

ants; that the three members of the State Highway Commission would, unless restrained by the court, take charge of the bridge as a part of the highway system of the State of Oklahoma, in violation of the complainants' rights under the franchises, and deprive the complainants of their property for the use and benefit of the traveling public, without compensation, and thus deprive complainants of their right to continue in possession of the bridge and to collect tolls from persons using the same; that the Attorney General of the State had threatened to institute proceedings against complainants to deprive them of their rights; that if complainants collected tolls after May 18, 1931, they would be subject to a forfeiture of $25.00 to each person from whom toll was collected, and would further be guilty of obstructing the public highway and subject to a fine of $100.00 for each offense; that the County Attorney of each of said counties had threatened similar proceedings against the complainants; that because of the threatened prosecutions, both civil and criminal, the invasion of complainants' rights and the taking of their property without right and without compensation, they have no adequate remedy at law; that they will be subjected to a multiplicity of suits by the defendants and by the citizens of the State having occasion to use said bridge. (R. 3-13).

A temporary restraining order was granted on May 1, 1931, and a hearing on the application for a temporary in-

junction was set for the 23rd day of May, 1931, and thereafter continued to May 25, 1931 (R. 27, 55, 56). On May 25th the cause came on regularly for hearing on the application for a temporary injunction, and evidence was introduced in support of said application (R. 55-60). After the introduction of the evidence on the application for a temporary injunction, the defendants filed motions to dismiss the bill, and by agreement of counsel notice of the hearing on the motions to dismiss was waived, and the court proceeded to hear said motions immediately (R. 61).

The two County Attorneys and the individual defendants moved to dismiss the bill on the ground that the bill did not state facts sufficient to entitle the plaintiffs to relief. The Attorney General and the members of the Highway Commission moved to dismiss on the ground that the bill did not state facts sufficient to entitle the plaintiffs to relief, and also on the ground that the suit was one against the State (R. 31-32). On consideration of the motions to dismiss, the court entered an order sustaining said motions "on the ground that the facts stated do not entitle the plaintiffs to relief in equity" (R. 41). The complainants appealed to the Circuit Court of Appeals, and an opinion was rendered by that court reversing the judgment of the District Court (R. 81). Certiorari was granted by this Court on October 10, 1932. The questions presented are: Whether the secondary franchises

for the operation of the toll bridge expired with the expiration of the corporate life of Purcell-Lexington Toll Bridge Company, and whether the suit as against the members of the Highway Commission and the Attorney General is one against the State of Oklahoma.

The respondents contend as follows:

1. The secondary franchises for the operation of the toll bridge were granted to individuals, and were not limited, as to duration, by the life of the corporate assignee.

2. The granting of a franchise to operate a toll bridge is not limited to bridge corporations organized pursuant to Section 5366, Compiled Oklahoma Statutes, 1921, and the County Commissioners were fully authorized to grant such franchises to the individual grantees.

3. In the absence of constitutional or legislative restrictions, a secondary franchise may be granted to all persons alike, whether natural or artificial.

4. A secondary franchise to operate a toll bridge granted to a bridge corporation, is wholly independent of the corporate existence of such bridge corporation.

5. The franchises authorized the grantees and their assigns to operate the toll bridge until such franchises should

be revoked by the Legislature, or the property should be acquired by purchase or condemnation. Such franchises are not violative of the perpetuity clause of the Oklahoma Constitution.

6. The suit is not against the State of Oklahoma.

## ARGUMENT

**The secondary franchises for the operation of the toll bridge were granted to individuals, and were not limited, as to duration, by the life of the corporate assignee.**

The bill of complaint alleged that the secondary franchises were granted to individuals who commenced the construction of the bridge, and that such individuals thereafter conveyed the same to Purcell-Lexington Toll Bridge Company, an Oklahoma corporation (R. 4-8). The franchises, which were attached to the bill, show that they were granted to Dorset Carter and Tom Halsell and their assigns (R. 13-17). In such circumstances, it is well settled that the duration of such secondary franchises is independent of and not influenced by the corporate existence of Purcell-Lexington Toll Bridge Company.

*Grove Bridge Company* v. *State,* 133 Okla. 115, 271 Pac. 846.

The District Court held that the secondary franchises were granted to Halsell and Carter for the benefit of Purcell-Lexington Toll Bridge Company, and that such franchises were limited to the life of the corporation. That conclusion was contrary to the allegations of the bill. The petitioners contend that the franchises attached to and made a part of the bill show that the franchises were granted to the individuals for the use and benefit of the bridge corporation which was thereafter organized. They call attention to the use of the words "bridge company" in the franchises as supporting that contention. It has been held that "company in its primary sense means an association of a number of individuals for the purpose of carrying on a legitimate business—a number of persons united for the same purpose or in a joint concern as a company of merchants," and that the word "company" includes individuals.

*Lowther* v. *Bridgeman* (W. Va.), 50 S. E. 410, 411;
*Singer Mfg. Company* v. *Wright*, 33 Fed. 121, 127.

The other provisions of the franchises, which have been referred to by counsel for petitioners as indicating that said franchises were granted for the benefit of the corporation, are just as appropriate in franchises granted to individuals as in those granted to corporations. In the last paragraph of the franchise it is provided that the grantees may transfer all of the rights and privileges therein granted unto any in-

dividual or corporation organized under the laws of the State of Oklahoma. That clause clearly shows that the grant was to the individual grantees with authority to assign the same either to individuals or to an Oklahoma corporation.

Counsel for the petitioners further contend that the evidence in the case shows that the secondary franchises were granted to the individuals for the benefit of the toll bridge corporation. The decree in this case was entered on motions to dismiss the bill "on the ground that the facts stated do not entitle the plaintiffs to relief in equity" (R. 41). At Pages 55-70 of the Record appears certain testimony which has been referred to by counsel for the petitioners. That testimony was taken in connection with complainants' application for a temporary injunction (R. 55-60). There was no hearing on the merits of the case, and the evidence which was introduced was only applicable to the application for a temporary injunction. Before the court determined the application for a temporary injunction, motions to dismiss the bill were filed and argued. Thereafter the court denied the application for a temporary injunction, and at the same time sustained the motions to dismiss "on the ground that the facts stated do not entitle the plaintiff to relief in equity." The complainants appealed from the order dismissing the bill. The evidence appearing in the transcript cannot be considered in determining whether the motions to dismiss should have been

sustained, as motions to dismiss because of the insufficiency of the allegations of the bill must be determined by the allegations of the bill and the attached exhibits.

*Stromberg Motor Devices Co.* v. *Holley Brothers*, 260 Fed. 220;
*Krouse* v. *Bevard Tannin Co.*, 249 Fed. 538;
*Old Dominion Trust Co.* v. *First National Bank*, 252 Fed. 613;
*Badger* v. *Arnold*, 282 Fed. 115.

**The granting of a franchise to operate a toll bridge is not limited to bridge corporations organized pursuant to Section 5366, Compiled Oklahoma Statutes, 1921.**

As the franchises under consideration were granted to individuals, it is necessary to determine whether there was, at the time of the granting of the secondary franchises, legal authority for granting such secondary franchises. It is conceded that the operation of a toll bridge is a business which requires a secondary franchise. If the Oklahoma Statutes limit the ownership and operation of toll bridges to bridge corporations organized pursuant to Section 5366, C. O. S. 1921, it necessarily follows that such secondary franchises cannot be granted to individuals as original grantees, and franchises originally granted to bridge corporations cannot be assigned to individuals. It is conceded by counsel for petitioners that authority to grant toll bridge franchises has

been delegated by the State to the Board of County Commissioners of the county in which the bridge is situated. They contend, however, that such authority is limited to bridge corporations organized under Section 5366. In the absence of constitutional or legislative restrictions, a secondary franchise may be granted to all persons alike, whether natural or artificial.

> *Lowther* v. *Bridgeman* (W. Va.), 50 S. E. 410, 411;
> *Watson* v. *Railroad Company,* 49 W. Va. 539, 39 S. E. 193;
> *Memphis, etc., Ry. Company* v. *Railroad Commissioners,* 112 U. S. 609, 619.

There is no constitutional or statutory inhibition in Oklahoma against the granting of a franchise to an individual for the purpose of owning and operating a toll bridge. It is not even contended by counsel for petitioners that Sections 5366 and 5367, C. O. S. 1921, contain a grant of authority authorizing the Board of County Commissioners to grant a secondary franchise. Section 5366 specifies what shall be contained in the articles of incorporation of a bridge corporation in order to entitle such corporation to receive a primary franchise from the State of Oklahoma. Said section contains no grant of a secondary franchise and no grant of authority to the Board of County Commissioners to grant such secondary franchise. A corporation having received a primary fran-

chise under said section, would have no authority to operate a toll bridge.

Section 5367, C. O. S. 1921, provides:

> "No such corporation shall construct or take tolls on a bridge until authority is granted therefor by the board of county commissioners of the county or counties in which it is to be located."

There is no delegation of authority to the Board of County Commissioners to grant a secondary franchise contained in that section, but it is merely a limitation on the power of a corporation created under Section 5366. By said section, the Legislature made it plain that the corporate charter granted under Section 5366 was not sufficient to authorize a bridge corporation to operate a toll bridge. The Supreme Court of Oklahoma, in *Postal Bridge Company* v. *State,* 139 Okla. 225, 227, 282 Pac. 462, 464, held that Section 5367 was not a grant of power, in the following language:

> "Defendant in error contends that Section 5367 is the only statute in Oklahoma granting authority for any person, firm or corporation to own and operate a toll bridge, and that said section limits that authority to toll bridge corporations incorporated as provided by Section 5366. This section is not a grant of power from the Legislature, but is a limitation upon a toll bridge corporation incorporated under Section 5366, *supra,* provided that it can-

not operate without it secures a secondary franchise from the county commissioners of the county or counties in which it is located."

It is necessary, therefore, to look further for the purpose of determining the authority of the Board of County Commissioners to grant franchises to operate a toll bridge. That authority is recognized in *Postal Bridge Company* v. *State, supra,* and it was there determined that the authority was not delegated in Sections 5366 and 5367.

The power of the Board of County Commissioners to grant franchises for the construction and operation of toll bridges arises out of the authority to construct and repair bridges and to open, lay out and vacate highways, granted by Section 1600 R. L. 1910, Section 5793, C. O. S. 1921, and the general control and supervision of the Board of County Commissioners over bridges more than fifteen feet wide, conferred by Section 7581, R. L. 1910. The power to grant a franchise is based upon the right of the authority granting the franchise to control the property over which the franchise is granted, or which is affected by it. This Court has recognized that a general statute delegating authority to control and supervise public roads is sufficient authority for the exercise of the right to grant a secondary franchise affecting such roads.

*Owensboro* v. *Cumberland Telephone & Telegraph Co.,* 230 U. S. 58, 67, 68.

In *Irvine Toll Bridge Company* v. *Estill County,* 210 Ky. 170, 275 S. W. 634, 636, it was held that a similar statute of the State of Kentucky was sufficient authority to authorize the granting of a franchise for the construction and operation of a toll bridge. Nowhere can there be found any inhibition against an individual owning and operating a toll bridge. Section 5367 recognizes that authority has been delegated to the county commissioners to grant such franchises, and limits the power of a bridge corporation to engage in business until it has procured such secondary franchise. Section 10076, C. O. S. 1921, recognizes the jurisdiction of the Board of County Commissioners over toll bridges, and also recognizes the right of an individual to own and operate a toll bridge. That section authorizes the Board of County Commissioners to acquire by purchase or by condemnation proceedings all the rights and properties of whatsoever character, "of any person, firm or corporation, used for and in the operation of any toll bridge in said county." Section 5625 and 5636, C. O. S. 1921, appearing at pages 57 and 61 of petitioners' brief, also recognizes the authority of the county commissioners to grant such franchises, and also recognizes the right of an individual to own and operate a toll bridge. By Section 5636 it is provided:

> "When a wagon, turnpike or plank road is constructed, owned or operated by any natural person, this article is

applicable to such person in like manner as it is applicable to corporations."

Counsel for petitioners contend that those provisions have application only to toll roads and have no application to a toll bridge. We contend that a bridge is a roadway, and when a charge is made for the use of the same, it constitutes a turnpike. The Supreme Court of Oklahoma took that view of the matter in the Postal Bridge Company case, in which it was said (282 Pac. 465):

> "The question of a right of an individual to own and operate a toll road *which included the right to own and operate toll bridges* as provided in Section 5627, *supra*, was before this court in *Gibson* v. *Rogers County ex rel. Hall, County Attorney, et al.*, 75 Okla. 51, 181 Pac. 720. * * * Under this section of the statute, an individual is specifically authorized to own and operate a toll bridge upon procuring a proper franchise from the Board of County Commissioners in the county in which said toll bridge is owned and operated."

In the case at bar, one end of the bridge stands on privately owned property and, at the other end, a private road leads from the bridge to the public street (R. 5, 6, 8). The bridge, therefore, was not only a toll bridge but also a toll road.

The said case of *Postal Bridge Company* v. *State, supra,* is a definite announcement of the highest court of the State

on the authority of the Board of County Commissioners to grant a franchise to operate a toll bridge to an individual. The bridge involved in that case was not a connecting link between parts of a toll road, but was a toll bridge constructed by a corporation organized under the provisions of Section 5366, C. O. S. 1921. The land at each end of the bridge belonged to the owners of the bridge, as in the case at bar. A secondary franchise was granted to the bridge corporation by the Board of County Commissioners of Blaine County. Thereafter the bridge corporation assigned the secondary franchise to Postal Bridge Company, a trust. The State contended that the secondary franchise to operate the toll bridge could not be assigned to Postal Bridge Company, a Trust, because a toll bridge could only be owned and operated by a corporation organized under Section 5366. The State further contended that the only authority for owning and operating a toll bridge was contained in Sections 5366 and 5367, and that an individual could not own and operate a toll bridge. The court held to the contrary, and specifically recognized the right of any person, firm or corporation to own and operate a toll bridge, and to receive a secondary franchise from the Board of County Commissioners. The court said:

> "Under this section of the statute an individual is specifically authorized to own and operate a toll bridge upon procuring a proper franchise from the board of county

commissioners in the county in which said toll bridge is owned and operated.

"In addition to this, Section 10076, C. O. S. 1921, authorizes the county commissioners to acquire by purchase, by agreement with the owner or owners thereof, or by condemnation proceedings, all the rights and properties of whatsoever character of any person, firm, or corporation, used for and in the operation of any toll bridge in said county. This specifically recognizes the right of any person, firm or corporation to own and operate a toll bridge. We are therefore of the opinion that an express trust was authorized under the statutes of Oklahoma to own and operate a toll bridge in this State."

In that case, the original franchise was granted to a bridge corporation, and was assigned by it to individuals. In the case at bar, the original franchise was granted to individuals and assigned to a bridge corporation. The principle involved is the same. No individual, firm or corporation can operate a toll bridge without a franchise. If franchises cannot be originally granted to individuals and can only be granted to bridge corporations, there would be no authority for an assignment of a franchise from a bridge corporation to an individual. If an assignment of such franchise may be made to an individual, it necessarily follows that a franchise could be originally granted to an individual.

We submit that the highest court of the State has decided that an individual may own and operate a toll bridge, and

that a franchise to operate the same may be granted by the Board of County Commissioners to an individual, and that such franchises are assignable. Hence, the County Commissioners of McClain and Cleveland Counties were authorized to grant the franchises to Halsell and Carter, and the same were assignable to Purcell-Lexington Toll Bridge Company and by that corporation to the complainants. The duration of such franchises is determined by the original franchises granted to Halsell and Carter, and is not limited in any way by the corporate life of Purcell-Lexington Toll Bridge Company.

Counsel for petitioners contend that the franchises do not recite that conditions preliminary to the granting of secondary franchises were performed. The franchises having been granted by the proper authorities and being regular on their faces, it is presumed that all preliminary conditions required by law were performed.

*Oklahoma City* v. *Derr*, 109 Okla. 192, 235 Pac. 218;

*Newman* v. *Warren-Quinlan Asphalt Company*, 177 Pac. 375;

*Crawford* v. *Cassity*, 78 Okla. 261, 190 Pac. 410;

*Board of Commissioners* v. *City of Fort Collins*, 68 Colo. 364, 189 Pac. 929;

*Fabric Fire Hose Co.* v. *Town of Caddo*, 59 Okla. 89, 158 Pac. 350.

**The period for which a secondary franchise may be granted to a corporation, organized pursuant to Section 5366, is not limited to twenty years.**

If it be conceded that the franchises herein were granted to Carter and Halsell for the benefit of the toll bridge corporation which was thereafter organized. the duration of such secondary franchises was not limited to the corporate life of Purcell-Lexington Toll Bridge Company. The secondary franchise to operate the toll bridge is wholly independent of the corporate existence of the toll bridge corporation.

*Grove Bridge Company* v. *State*, 133 Okla. 115, 271 Pac. 846;

*City of Owensboro* v. *Cumberland Telephone & Telegraph Company*, 230 U. S. 58;

*Detroit Citizens Street Railway Co.* v. *City of Detroit*, 64 Fed. 628;;

*Grand Rapids Bridge Co.* v. *Prange*, 35 Mich. 400;

*Old Colony Trust Co.* v. *City of Omaha*, 230 U. S. 101;

*State* v. *Des Moines Street Railway Co.*, 159 Ia. 259, 140 N. W. 437;

*Calder* v. *Michigan*, 218 U. S. 591, 600;

*Detroit* v. *Detroit Citizens Street Railway Co.*, 184 U. S. 368, 394, 395;

*Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U. S. 453, 464;

*Minneapolis* v. *Street Railway Co.*, 215 U. S. 417, 430.

The fact that such franchises are assignable, as held in *Postal Bridge Co.* v. *State, supra,* is a further recognition that such franchises are independent of the primary corporate franchise.

*State ex rel.* v. *Scott County Road Company,* 207 Mo. 54 (S. C.), 215 U. S. 336, has been cited as authority for the contention that the franchise to collect tolls is limited in duration to the life of the corporation In that case the same act of the Legislature which incorporated the company granted the right to take tolls and limited such right to a period of fifty years.

In *Rockwith* v. *State Road Bridge Company* (Mich.), 108 N. W. 785, the secondary franchise was granted to the corporation and not to its successors and assigns. The court held that such fact distinguished the case from *Detroit Street Railway Company* v. *Detroit, supra.*

The distinction between such cases and the case at bar is well stated in *City of Owensboro* v. *Cumberland Telephone & Telegraph Company,* 230 U. S. 58, in which it was said:

> "The grant was to the particular company by name and was not to its assigns or successors. This court likened such a grant to a grant at common law to a natural person without words of restriction, which, said the court, 'creates only an estate for the life of the grantee;

for he can hold the property no longer than he himself exists.' The grant here involved was to the corporate grantee, its assigns and successors, and falls under the principle of the cases cited above."

In the case at bar the franchises were granted to the grantees and their successors and assigns; the primary corporate franchise was granted by the State, and the secondary franchises to collect tolls were granted by the county commissioners. The term of the secondary franchises is therefore not controlled by the duration of the corporate franchise.

**The franchises are not violative of the perpetuity clause of the Oklahoma Constitution.**

As these franchises were not limited in duration by the corporate life of Purcell-Lexington Toll Bridge Company, the expiration of the charter of that corporation had no effect on the secondary franchises. Those franchises were assigned to the complainants prior to the expiration of the corporate charter. However, it is necessary to determine the duration of such secondary franchises in order to determine whether such secondary franchises had expired when this suit was brought. There is no question involved as to the extension of the secondary franchises. The respondents do not contend that the secondary franchises were extended, but do contend that the original grants made to Halsell and Carter, and owned by the complainants at the time this suit was brought,

had not expired. Each of the franchises contain the following language:

"That the grants herein made shall be perpetual and subject only to such limitations as is by law now, or may be hereafter provided."

It is generally recognized that a secondary franchise, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general laws of the State, is a grant of a property right in perpetuity.

*Owensboro* v. *Cumberland Telephone and Telegraph Co.*, 230 U. S. 58, 65;
*Detroit* v. *Detroit Citizens Street Railway Co.*, 184 U. S. 368, 395;
*Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100.

The Statutes of Oklahoma authorizing boards of county commissioners to grant toll bridge franchises contain no limitation as to the period for which such franchises may be granted. In the general law of the State, we find provisions which are more effective and afford a greater degree of protection to the public than if a definite period had been stated in the franchises. Section 10076, C. O. S. 1921, authorizes the board of county commissioners, by purchase or by condemnation proceedings, to acquire all of the rights and properties of any person, firm, or corporation, used for and in the operation of any toll bridge in the county. In Chapter 256,

Laws of 1925, the Legislature authorized the State Highway Commission to acquire toll bridges, and provided a limit of compensation. Neither statute provided any compensation for the franchise. If a franchise for a specified term had been granted and an effort had been made to take the property by condemnation proceedings, it would have been necessary to compensate the owner for the unexpired period of the franchise. The franchises in the instant case have been subject to termination at all times since the construction of the bridge by condemnation of the physical property. However, the most recent limitation is found in Section 47 of Article IX of the Oklahoma Constitution, and is as follows:

> "The Legislature shall have power to alter, amend, annul, revoke, or repeal any charter of incorporation or franchise now existing and subject to be altered, amended, annulled, revoked, or repealed at the time of the adoption of this Constitution, or any that may be hereafter created, whenever in its opinion it may be injurious to the citizens of this State, in such manner, however, that no injustice shall be done to the incorporators."

Counsel for the petitioners contend that the above constitutional provision has no application to secondary franchises, but only applies to the primary franchise of a corporation. In support of that contention they quote from a concurring opinion of Justice Lester in *City of Okmulgee* v. *Okmulgee Gas Company*, 282 Pac. 653. The statement contained

therein was not a part of the opinion of the court. This question was directly involved in *Oklahoma City* v. *Shields*, 22 Okla. 265, 100 Pac. 559, and the court held that said section was applicable to secondary franchises. That case involved a secondary franchise granted by a municipality as distinguished from the corporate franchise, and the court, in holding that said constitutional provision included franchises, said (100 Pac. 572):

> "The Constitutional Convention, desiring to preserve the reservations in Section 932, Wilson's Rev. & Ann. St. 1903, *supra*, incorporated said section in the Constitution, and specifically included franchises. * * * These municipal subdivisions in their infancy, by an overdesire to build and grow, frequently through their municipal government ill advisedly grant away valuable franchises, shackling and burdening future generations And were it not for the wise provisions in the economy of our law, reserving the power to amend and repeal, and to impose additional burdens upon franchises and these public privileges, the officers of such municipalities, in their overdesire to build, grow, and develop, might unwisely burden the future to develop the present
>
> "No municipal body has the moral right to grant away the privileges and rights of future generations It is an unwise and unfatherly parent that makes obligations that will bind and shackle and dwarf his children, and bring them to grief and misfortune It is an unwise municipal government that would seek to shackle and to bind the administrations of the coming years And it is wise and

salutary in the economy of state building that such powers have been reserved to the Legislature to have the paramount supervision and control."

Under the authority contained in Section 47 of Article IX of the Constitution, the Legislature of the State has the power to repeal and cancel secondary franchises of the complainants at any time. The franchises are not perpetual, but are terminable at the pleasure of the Legislature That character of franchise, without specification of the period of duration, is not unusual in other states and is rather common in the State of Oklahoma. All railroad, oil pipe, express, telephone and telegraph companies operating in this State operate under similar provisions, reservations and franchises by virtue of Section 20 of Article IX of the Constitution. That provision of the Constitution is a grant of authority, which, when accepted by the utilities therein mentioned, is a franchise, and continues until such time as the Legislature, acting under the provisions of Section 47 of Article IX, shall change or repeal the franchise. In the instant case the franchises were to continue until such time as the Legislature should repeal them or the physical properties should be taken by condemnation proceedings. The State has taken no steps to repeal such franchises, and no attempt has been made to acquire the same by condemnation. Hence, such franchises are still in force. Counsel for petitioners contend that a franchise of

this character is a perpetuity and violates Section 32 of Article II of the Oklahoma Constitution, which declares that perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed. In support of that contention they city *City of Okmulgee* v. *Okmulgee Gas Company,* 140 Okla. 88, 282 Pac. 640, and other similar cases. In those cases the court had under consideration franchises for the furnishing of power, light, heat, gas, electricity or water as a public utility in any city or town of this State. Such franchises were granted by cities and towns under and subject to the provisions of Sections 5(a) and 5(b) of Article XVIII of the Oklahoma Constitution. It is not contended that the franchises involved in the case at bar were issued under or subject to, those provisions of the Constitution. The statement relative to perpetuities in the Okmulgee case must be construed in connection with the principal conclusions running throughout the opinion, to-wit, that Sections 5(a) and 5(b) of Article XVIII provide how a municipal franchise may be created, extended or renewed, and limit the period to twenty-five years. As those sections of the Constitution vested that power in the municipalities, such power could not be exercised by the Legislature, and as the provisions of the Act which was under consideration attempted to take away from the municipalities the power to alter, amend or repeal a franchise, and attempted to deprive the municipalities of the power

to limit the duration to twenty-five years, such Act, as far as the municipalities were concerned, would create a franchise of perpetual duration, as the only authority to repeal was in the Legislature. In other words, the power of altering, renewing and extending such franchises, which the Constitution had vested in the municipalities, and limited to a period of twenty-five years, the Legislature had attempted to usurp, with the result that a municipality which had granted a franchise under authority of the Constitution, was powerless to control its termination, renewal or extension. In the matter of toll bridge franchises, there are no constitutional provisions similar to Sections 5(a) and 5(b) of Article XVIII, and the Legislature has full power to alter, repeal or modify such franchises under Section 47 of Article IX of the Constitution, and the counties have full power to terminate such franchises by purchase or condemnation of the property.

If a thing having perpetual duration should be held to be violative of the rule against perpetuities, the franchises in the instant case are not in conflict with such rule, as they are not of perpetual duration. In *City of Seattle* v. *Columbia, etc., Company*, 6 Wash. 379, 33 Pac. 1048, it was said:

> "A city's franchise to a railroad to run through its streets cannot be void for perpetuity and irrevocableness, since there is always recourse to the power of eminent domain."

Likewise, under authority of Oklahoma City v. Shields, *supra*, the franchises were subject to termination at any time under Section 47 of Article IX of the Constitution, and cannot be said to be of perpetual duration.

If, however, this Court should be of the opinion that the above decisions of the Supreme Court of Oklahoma are applicable to the franchises in the instant case, and that Section 32 of Article II of the Constitution has been construed so as to prohibit the franchises in the instant case, we submit that such decisions are not binding on this Court.

**State court decisions, construing state constitutional provisions after contracts had been entered into and rights had accrued thereon, are not binding on Federal courts, and Federal courts assert the right to adopt their own interpretation of the law applicable to the case.**

*Pease* v. *Peck*, 18 How. 595;
*Thompson* v. *Perrine*, 103 U. S. 806;
*Burgess* v. *Seligman*, 107 U. S. 20;
*Folsom* v. *Townsend*, 159 U. S. 611;
*Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349;
*Moore-Mansfield Construction Co.* v. *Electrical Intallation Company*, 234 U. S. 619;
*Enfield* v. *Jordan*, 119 U. S. 680;
*Bolles* v. *Brimfield*, 120 U. S. 759;
*Barnum* v. *Okolona*, 148 U. S. 393;
*Mothersead, Bank Commissioner of Oklahoma* v. *U. S. F & G. Co.*, 72 Fed. (2d.) 644;

*City and County of Denver* v. *Denver Tramway Corporation*, 23 Fed. (2d) 287; certiorari denied 278 U. S. 616.

These franchises were granted in 1911. At that time Section 32 of Article II of the Oklahoma Constitution prohibited perpetuities, but there was no definition of the word "perpetuities" contained in the Constitution or Statutes, and it was necessary to look to the general law for such definition. There was no decision of the Supreme Court of Oklahoma on the subject until the decision in *McLaughlin* v. *Yingling*, 90 Okla. 159, 213 Pac. 552, which recognized the common-law definition of perpetuities.

At the time these franchises were granted and at the time of the adoption of the Constitution of Oklahoma, the law was well settled that the rule against perpetuities relates only to the vesting of an estate and not to its duration.

*Lewis on Perpetuity*, p. 173;
*Sanders Essay on Uses and Trusts*, p. 196;
*Kent's Commentaries on American Law*, Vol. 4, p. 267;
*Perrin* v. *Corey*, 24 How. 231, 235;
*Hazen* v. *American Security & Trust Company*, 265 Fed. 447;
*Pulitzer* v. *Livingston*, 89 Me. 359, 36 Atl. 635;
*Gray* v. *Whittmore*, 192 Mass. 367, 78 N. E. 422;
*Closset* v. *Burtchaell*, 112 Ore. 585, 230 Pac. 554;
*Hawkins* v. *Ghent*, 154 Md. 261, 140 Atl. 212;

*Ewalt* v. *Davenhill*, 257 Pa. 385, 101 Atl. 756;
*Phillips* v. *Harrow*, 93 Ia. 92, 61 N. W. 434;
*Nicol* v. *Morton*, 332 Ill. 533, 164 N. E. 5.

The decision in City of Okmulgee v. Okmulgee Gas Company was rendered in 1929, and is therefore not binding on this Court in construing these franchises. We submit that the franchises granted prior to any construction by the Supreme Court of the State, and which are subject to alteration, repeal or modification by the Legislature, and are subject to termination by condemnation proceedings, should not be held to be violative of the rule against perpetuities.

**If the franchises were void, there has been no dedication of the toll bridge to the public, and the bridge is private property and cannot be taken for public use without compensation.**

Counsel for the petitioners have cited a number of cases which hold that upon the expiration of a toll bridge franchise, the public has the right to use the bridge free of tolls. All of those cases are based on the theory that the owners of the bridge having received a valid franchise and the right to collect tolls for a definite period, are held to have dedicated the bridge as a part of a public highway in consideration of such franchise. In the case at bar, the franchises are either valid grants to Carter and Halsell and their assigns to operate the bridge until such time as the franchises shall be repealed by the Legislature or the property taken by condemnation, or

such franchises were void *ab initio*. If the franchises were void, there was no dedication of the property to the public. There is no statutory dedication in Oklahoma, and if the bridge has been dedicated to the public, it is by reason of an implied dedication in the nature of an estoppel *in pais*.

*Cincinnati* v. *White*, 6 Pet. 431;
*Morgan* v. *Railroad Co.*, 96 U. S. 716;
*Elliott on Roads and Streets*, 3rd Ed., Vol. 1, Sec. 137.

If the franchises were void, it cannot be said that respondents were estopped in equity from asserting their ownership of the property, as the sole consideration moving to them was the granting of the franchises. On the contrary, it is equitable to say that if the franchises were void, there was no dedication and the property belongs to appellants and cannot be taken for public use without compensation. In Postal Bridge Company v. State, *supra*, the court said:

> "It is the contention that the DeLuxe Bridge Company never received any franchise. The franchise is a grant from the State as compensation for the building of the bridge, and, if there was no valid franchise, there could be no valid dedication. Can the State be heard to say, we will permit you to build this bridge on the theory and belief that you have a valid franchise and that you may dedicate it to the public use, and then enjoin the company from collecting tolls. The State has no right to take pri-

vate property for public use without compensation, and a court of equity will never lend its aid to such a proceeding."

See also, *Garvin County* v. *Lindsay Bridge Company*, 32 Okla. 784, 124 Pac. 324.

**The suit is not against the State of Oklahoma.**

The objection that the suit is against the State of Oklahoma has no application to any of the defendants except the members of the State Highway Commission and the Attorney General. As to the citizens of the State of Oklahoma who will make use of said bridge, and who are represented by the six individual defendants as representative of the class, and as to the county attorneys of the two counties, it is conceded by petitioners that the requisite diversity of citizenship existed, and a suit against them is not a suit against the State.

As to the other defendants, the bill of complaint sought to prevent them from committing unlawful acts against rights and property of the complainants, which said defendants are threatening to commit without right and in excess of their power. As to such defendants the suit was not one against the State. The State of Oklahoma had no pecuniary interest in the suit. The only parties pecuniarily affected are the persons who use the bridge and who are required to pay toll for such use. oNt a dollar will be taken from the treasury of the

State, and no pecuniary obligation to it will be enforced by any decree which may be rendered.

*Reagan* v. *Farmers Loan & Trust Company*, 154 U. S. 362, 390;
*Old Colony Trust Company* v. *City of Seattle*, 271 U. S. 426;
*Missouri, Kansas & Texas Ry. Co.* v. *Missouri Railroad & Warehouse Commissioners*, 183 U. S. 53, 59;
*Ex parte Young*, 209 U. S. 123;
*Prout* v. *Starr*, 188 U. S. 537;
*Osborne* v. *Bank of U. S.*, 9 Wheat. 738;
*Allen* v. *B. & O. R. R. Co.*, 114 U. S. 270;
*Weiland* v. *Pioneer Irr. Co.*, 238 Fed. 519;
*Magruder* v. *Belle-Fourche Valley Waters Users Association*, 219 Fed 72;
*Strain* v. *U. S. F. & G. Co.*, 292 Fed. 694;
*Cline* v. *Fink Dairy Co*, 274 U. S. 445;

The case of *In re Ayres*, 123 U. S. 443, is not in conflict with the above case, and does not support the petitioners' contention that the instant suit is one against the State. The distinction is recognized at pages 498-502 of In re Ayres. The wrong complained of and sought to be prevented by the injunction prayed for in the instant case, was the threatened unlawful and wrongful seizure of the property of the respondents. In doing so they were not acting for the State of Oklahoma, as their acts were unauthorized and wrongful and in violation of law. The distinction is further recognized in

*Pennoyer* v. *McConaughy*, 140 U. S. 1, 10, in which it was said:

> "The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. *In re Ayers*, 123 U. S. 443; *Louisiana* v. *Jumel*, 107 U. S. 711; *Antoni* v *Greenhow*, 107 U. S. 769; *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446; *Hagood* v. *Southern*, 117 U S. 52.
>
> "The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the State."

In Reagan v. Farmers Loan & Trust Company, *supra*, this Court recognized that wrongful and illegal acts of individuals, threatened and attempted under color of their office, authorized suit against such officers although the unconstitutionality of a state statute was not involved.

The distinction is further recognized in *Ex parte Young*, 209 U. S. 123, 152, in which it was said:

> "The cases above cited do not include one exactly like this under discussion. They serve to illustrate the principles upon which many cases have been decided. We have not cited all the cases, as we have not thought it necessary. But the injunction asked for in the Ayers Case, 123 U. S. (*supra*), was to restrain the state officers from commencing suits under the Act of May 12, 1887 (alleged to be unconstitutional), in the name of the State and brought to recover taxes for its use, on the ground that if such suits were commenced they would be a breach of a contract with the State. The injunction was declared illegal because the suit itself could not be entertained as it was one against the State to enforce its alleged contract. It was said, however, that if the court had power to entertain such a suit, it would have power to grant the restraining order preventing the commencement of suits. (Page 487). It was not stated that the suit or the injunction was necessarily confined to a case of a threatened direct trespass upon or injury to property."

The prayer for injunctive relief against the bringing of criminal and civil proceedings was merely incidental to the

primary prayer for injunctive relief against the threatened wrongful seizure of respondents' property and the wrongful invasion of their property rights. The Federal Court having jurisdiction to enjoin the latter was authorized to protect its jurisdiction, to the exclusion of all other courts, until its duty was fully performed. Ex parte Young, *supra,* pp. 161, 162.

We submit that the judgment of the Circuit Court of Appeals of the Tenth Circuit should be affirmed.

Respectfully submitted,

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*Of Counsel.*

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# SUPREME COURT OF THE UNITED STATES.

No. 147.—October Term, 1932.

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| Sam Hawks and Others, Petitioners, *vs.* Charles H. Hamill and Willoughby G. Walling, Respondents. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit. |

[January 9, 1933.]

Mr. Justice Cardozo delivered the opinion of the Court.

The respondents, claiming to be the owners of a perpetual franchise to collect tolls for the use of a bridge across the Canadian River, brought suit in the United States District Court against the members of the State Highway Commission of Oklahoma, the Attorney General of that state, the County Attorneys of McClain and Cleveland Counties, and other persons, residents of the neighborhood, to restrain a threatened interference with the maintenance of the bridge or the collection of tolls. The jurisdiction of the federal court was invoked upon the ground of diversity of citizenship. The defendants (petitioners in this court) made a motion, without answering, to dismiss the complaint. The complainants moved at the same time for an injunction *pendente lite*. The District Court denied the motion for an injunction, and granted the motion to dismiss. The Circuit Court of Appeals for the Tenth Circuit reversed the decree and directed judgment in favor of the complainants for the relief demanded in the complaint. 59 F. (2d) 41. A writ of certiorari brings the case here.

The facts exhibited in the bill are these. On April 22, 1911, the County Commissioners of McClain County, Oklahoma, adopted a resolution whereby there was granted to Carter and Halsell, or their assigns, a franchise to construct and operate a toll bridge across the Canadian River at the City of Purcell, the bridge to be erected within the time prescribed by law. The tolls enumerated in a schedule were not to be increased "by the bridge company," though they might be reduced. By the terms of the resolution, the grant was to be "perpetual," subject only to such limitations

as were provided by law. The grantees were to be at liberty to transfer their rights and privileges to "any individual or corporation," with the same effect as if the grant had been made to the assigns directly. On May 16, 1911, the County Commissioners of Cleveland County on the other side of the Canadian River adopted a like resolution for the grant of a like franchise to the same grantees. On May 18, 1911, Carter, one of the grantees, together with Walling and Hamill, the present respondents, caused a corporation, known as the Purcell-Lexington Toll Bridge Company, to be organized under the laws of Oklahoma, with a corporate life of twenty years. Thereafter in December, 1911, while the bridge was in course of construction, the grantees of the franchises, together with the respondents, conveyed the bridge, its approaches and all the rights and privileges embraced within the franchises or either of them to the Purcell-Lexington Toll Bridge Company, its successors and assigns. The corporate life of the Purcell-Lexington Toll Bridge Company was to expire, as we have seen, on May 18, 1931. Before that time, and on April 2, 1931, the bridge company conveyed to the respondents and to Carter, and their assigns, the bridge and the accompanying franchises, the respondents receiving afterwards from Carter an assignment of his interest, whatever it might be. Thereupon the defendants, who are the petitioners here, gave notice that on May 18, 1931, the bridge would become a free bridge and part of the free highway system of the State of Oklahoma. The members of the State Highway Commission, the Attorney General, the County Attorneys, as well as the neighboring residents, who, it seems, are also the County Commissioners, announced a purpose to prevent the collection of tolls by the respondents, and to cause the bridge to be kept open for free and unimpeded passage. This suit for an injunction followed.

The District Court held that the County Commissioners were without authority to grant a franchise to individuals except in trust for a corporation organized under the bridge law; that the term of the corporate life was also the limit of the duration of the privilege to charge and levy tolls; that a perpetual franchise, if intended, would be void under Article II, § 32 of the Constitution of Oklahoma, prohibiting "perpetuities"; and that the bill should be dismissed. The Circuit Court of Appeals, in reversing this judgment, held that the franchises were not invalid because granted

to individuals; that upon assignment to a corporation organized for a term of twenty years, the franchises were not cut down in respect of their duration, but continued in full force when conveyed by the assignee to others; that the term "perpetuities" as used in Article II, § 32 of the Constitution of Oklahoma had in view the creation of future estates and did not limit the enjoyment of a privilege or franchise; and that the complainants should have an injunction as prayed for in the bill.

Article II, § 32 of the Constitution of Oklahoma provides: "Perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed, nor shall the law of primogeniture or entailment ever be in force in this state." Construing that provision the Court of Appeals said: "We do not doubt that the word 'perpetuities' . . . was not intended to mean or be equivalent to perpetual franchises, but was intended to limit the power to pass titles that would vest *in futuro.*" But the Supreme Court of Oklahoma has not circumscribed the word so narrowly. It has said that a forbidden perpetuity is created when there is granted to an individual or corporation a perpetual privilege or franchise. It has gone farther: it has said that a privilege or franchise is perpetual if indefinite in duration, though it be subject to revocation at the pleasure of the legislature. The question came before the court in *City of Okmulgee* v. *Okmulgee Gas Company*, 140 Okl. 88. The legislature of Oklahoma had passed an act whereby a public service corporation holding a franchise from a municipality for a fixed term of years was to be at liberty to exchange it for a revocable permit. The court said that such a permit, if viewed as a grant from the municipality, was forbidden by Article XVIII, § 5a, which provides in effect that no franchise shall be granted by a municipal corporation for a longer term than twenty-five years. On the other hand, if the permit could be viewed as one proceeding directly from the state, the court said that it would then be a perpetuity within the prohibition of Article II, § 32. The permit was not saved by the reservation to the legislature of a power to revoke it. In the view of the court (p. 98), a franchise "not limited in its existence to a fixed and definite period of years" is to be classified as "a perpetual franchise," and hence an unlawful perpetuity. To avoid misapprehension the court at the end of its opinion summarized its conclusions (p. 100).

"Any act of the legislature which provides for issuing a license, revocable permit, indeterminate permit, or other instrument in the nature of a franchise which is not limited as to its time of existence, violates section 32 of Article II of our Constitution." See, to the same effect: *In re Okmulgee Gas Company,* 141 Okl. 98; *In re Oklahoma Power Company,* 141 Okl. 100.

We do not now determine what meaning we would give to the Oklahoma Constitution if the question were before us as an original one, unhampered by any pronouncement of the courts of that state. Much can be said in support of the respondents' position that the perpetuities denounced are those arising from the creation of future estates or from restraints upon alienation without reasonable limit. The question is one distinctively local in origin and content. The prohibition is embodied in the local Constitution. Not only that, but it is designed to give effect to "the genius" of the government, an impalpable existence that can best be apprehended and defined by perceptions and experiences sharpened and developed through the associations of the vicinage. "In a case involving local history, as this does, we should be slow to overrule the decision of courts steeped in the local tradition, even if we saw reason for doubting it." *Jackman* v. *Rosenbaum Company,* 260 U. S. 22, 32; cf. *Diaz* v. *Gonzalez,* 261 U. S. 102, 105, 106. To define a "perpetuity" for a young and developing community there must be recourse to something more than the pages of a dictionary. The word to be defined, in common with words generally, will have a color and a content that will vary with the setting. *Towne* v. *Eisner,* 245 U. S. 418, 425; *Int. Stevedoring Co.* v. *Haverty,* 272 U. S. 50; *Surace* v. *Danna,* 248 N. Y. 18, 21. It comes down to its interpreters freighted with subtle implications, with the "tacit assumptions," the "unwritten practices," the "thousand influences" and "values" that "logic and grammar never could have got from the books." *Diaz* v. *Gonzalez, supra.* Out of two or more meanings that were possible and plausible, the State of Oklahoma has picked the one comporting best in the thought of her official spokesmen with the "genius" of her history. The mists of our own uncertainties are scattered when pierced by this authentic evidence of the law of the locality. *Chicago, M., St. P. & P. R. R.* v. *Risty,* 276 U. S. 567, 570; *People of Sioux County* v. *National Surety Co.,* 276 U. S. 238; cf. *Porter* v. *Investors Syndicate,* — U. S. —, December 5, 1932.

We are urged by the respondents to exert a power of independent judgment though the law to be interpreted be a constitution or a statute, and not merely the form of law which has come to be spoken of as general. Cf. *Burgess* v. *Seligman*, 107 U. S. 20. The power, we are told, exists because at the grant of these franchises in 1911, the Courts of Oklahoma had not yet spoken as to the meaning of the Constitution by defining the "perpetuities" within the zone of its restraints. *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349; *Moore-Mansfield Construction Co.* v. *Electrical Installation Co.*, 234 U. S. 619, 625; *Edward Hines Trustees* v. *Martin*, 268 U. S. 458, 463. Obedience is due to the courts of the state if the decisions claiming fealty are so many and unequivocal as to make out a "rule of property." *Edward Hines Trustees* v. *Martin*, *supra*, at pp. 463, 464. As to this there is no denial. The argument is that the fetters of obedience are released when there is only a single state decision, and this subsequent to the transaction out of which rights and duties have developed. *Kuhn* v. *Fairmont Coal Co.*, *supra*; *Edward Hines Trustees* v. *Martin*, *supra*. One hurdle, it is said, will be overlept if there are no barriers beyond.

Choice is not so free as the argument assumes. If the single decision interpreting a constitution or a statute is clear and unequivocal, submission to its holding has developed in these days into a practice so nearly uniform that there is little need to consider whether under pressure of extraordinary circumstances there is a privilege to deviate. Whatever doubt as to the practice may have prevailed in days gone by has been dispelled by recent judgments. *Chicago, M., St. P. & P. R. R.* v. *Risty*, *supra*; *People of Sioux County* v. *National Surety Co.*, *supra*. Indeed the radiating potencies of a decision may go beyond the actual holding. A wise comity has decreed that deference shall at times be owing, though there may be lacking, in the circumstances, a strict duty of obedience. Cf. *Sim* v. *Edenborn*, 242 U. S. 131, 135. An opinion may be so framed that there is doubt whether the part of it invoked as an authority is to be ranked as a definitive holding or merely a considered dictum. What was said in *City of Okmulgee* v. *Okmulgee Gas Co.*, *supra*, as to the meaning of perpetuities was probably intended to be a definitive holding. Cf. 141 Okl. 98; 141 *id.* 100. To be sure there is room for argument that limiting distinctions will have to be drawn in the future. We must leave

it to the courts of Oklahoma to declare what they shall be. But the result will not be changed though the definition of perpetuities be something less than a decision. At least it is a considered dictum, and not comment merely *obiter*. It has capacity, though it be less than a decision, to tilt the balanced mind toward submission and agreement. Cf. *Sim* v. *Edenborn, supra; Lankford* v. *Platte Iron Works*, 235 U. S. 461, 474. No controversy is here as to the impairment of the obligation of a contract in violation of the restraints of the federal constitution. We are not to confuse the standards of independent judgment appropriate in such conditions (*Coombes* v. *Getz*, 285 U. S. 434, 441; *Shriver* v. *Woodbine Bank*, 285 U. S. 467, 475) with those appropriate where the only basis of jurisdiction is diversity of citizenship. The Oklahoma decision as to the validity of a grant in perpetuity is not an act of legislation, and would not have impaired the contract embodied in the grant though it had overruled a contrary decision previously rendered. *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444; *Fleming* v. *Fleming*, 264 U. S. 29; *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, — U. S. —, December 5, 1932. What is at issue in this case is not an actual or even a claimed impairment of any right or privilege assured to the respondents by the Constitution of the nation. What is at issue is the validity of a privilege or claim of privilege to obstruct a bridge across a public stream. The case does not call for a decision as to the ownership of the structure of the bridge or the right of the complainants to tear it down hereafter. Cf. *State* v. *Lawrence Bridge Co.*, 22 Kan. 438, 463. The decision that is called for is one as to the privilege of the complainants, while maintaining an obstruction of navigable waters, to exact payments from the public. The statutes of Oklahoma are explicit that tolls may never be collected unless permitted by a franchise (Wagon Road Act, Consolidated Oklahoma Statutes, § 5627; Toll Bridge Corporations Act, Consolidated Oklahoma Statutes, §5367). In controversies so purely local, little gain is to be derived from drawing nice distinctions between dicta and decisions. Disagreement with either, even though permissible, is at best a last resort, to be embraced with caution and reluctance. The stranger from afar, unacquainted with the local ways, permits himself to be guided by the best evidence available, the directions or the counsel of those who dwell upon the spot.

The case thus far has been considered from the viewpoint of the substantive law, the basic rights and duties contested by the litigants. There is another path of approach that brings us to the same goal, an approach along the line of the law of equitable remedies. Caution and reluctance there must be in any case where there is the threat of opposition, in respect of local controversies, between state and federal courts. Caution and reluctance there must be in special measure where relief, if granted, is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties. In such circumstances this court has said that an injunction ought not to issue "unless in a case reasonably free from doubt." *Mass. State Grange* v. *Benton*, 272 U. S. 525, 527. The rule has been characterized as an "important" one, to be "very strictly observed." 272 U. S. at 527, 529. Compare *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159; *Cavanaugh* v. *Looney*, 248 U. S. 453, 456. It is such interference by the process of injunction with the activities of state officers that the respondents now seek. The members of the State Highway Commission believe it to be their official duty to take possession of the bridge, and propose to act accordingly. The Attorney General of the state is about to institute proceedings at law and in equity to vindicate the public rights or what he believes to be such rights. The County Attorneys of McClain and Cleveland Counties propose to sue for fines and penalties. All these activities the respondents ask us to enjoin. Indeed all have been enjoined by the decree under review. Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state. A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium. Reluctance there has been to use the process of federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin. *Mass. State Grange* v. *Benton, supra; Stratton* v. *St. Louis S. W. Ry. Co.*, 284 U. S. 530; *Matthews* v. *Rodgers*, 284 U. S. 521. There must be reluctance even greater when the rights are strictly local, jurisdiction having no other basis than the accidents of residence. The need is clamant in such circumstances for cautious hesitation. If there

were to be a concession *arguendo* that the meaning of "perpetuities" is still an unsettled question after the decisions in Oklahoma, there is surely no room for a contention that a meaning in opposition to those decisions is reasonably free from doubt. Our process does not issue unless the path is clear.

What has been written has had its basis in the assumption that an indeterminate franchise is a perpetuity within the meaning of the Constitution of Oklahoma, or at the very least that state officers acting in that belief are not subject to an injunction at the instance of the federal courts. The case for the respondents would be beset, however, with other doubts and difficulties if all these were to be removed. There would still remain the uncertainty whether the franchise granted by the county was to the grantees for their own use or for the use of a corporation to be organized thereafter; whether the corporation was to be one under the "Wagon Road" law, with an indeterminate duration, or under the "Bridge Companies" act, with a duration of twenty years; and whether the public policy of Oklahoma, disclosed by her statutes and decisions, and irrespective of decisions elsewhere, sets a limit upon the toll right, or what is known as the secondary franchise, coterminous with the primary franchise to exist and engage in business in a corporate capacity. By the statement of these questions we convey no hint as to the answer. We do no more than emphasize the complexities of law as well as of policy in which the respondents' title is involved, and the unwisdom of superseding the official acts and powers of the agents of the vicinage by writ out of a federal court.

The decree of the Circuit Court of Appeals must be reversed, and the judgment of the District Court dismissing the complaint affirmed.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*